Supreme Court, U. S.
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In the

Supreme Court of the United States.

OCTOBER TERM, 1978.

No. 79-371

FREDERICK BUTTERWORTH ET AL.,
PETITIONERS,

v.

TERRELL WALKER,
RESPONDENT.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

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Table of Contents.

Opinion below 1

Jurisdiction 1

Question presented 2

Constitutional provisions involved 2

Statement of the case 3

- Prior proceedings 3
- Statement of facts 3

Reasons for granting the writ 7

- A compelled pre-trial announcement by a criminal defendant which demonstrates only his satisfaction or dissatisfaction with each juror as they are chosen is not within the scope of the Fifth Amendment privilege against self-incrimination 8
  - A. The Fifth Amendment prohibits only compelled statements which are offered for the truth of their content 9
  - B. The effect of the respondent's compelled statements on the successful presentation of of his insanity defense was de minimis 12

Conclusion 14

Appendix A: Opinion of Supreme Judicial Court of Massachusetts 1a

Appendix B: Opinion of United States District Court for the District of Massachusetts 39a

Appendix C: Opinion of United States Court of Appeals for the First Circuit 65a

Table of Authorities Cited.

Cases.

Brooks v. Tennessee, 406 U.S. 605 (1972) 13n
Buchalter v. New York, 319 U.S. 427 (1943) 12
California v. Byers, 402 U.S. 424 (1971) 13
Chapman v. California, 386 U.S. 18 (1967) 12
Commonwealth v. McHoul, 352 Mass. 544 (1967) 7n
Commonwealth v. Millen, 289 Mass. 441 (1935), cert. den. 295 U.S. 765 (1935) 8
Commonwealth v. Walker, 370 Mass. 548 (1976) 3, 12
Donnelly v. DeChristoforo, 416 U.S. 637 (1974) 9n
Gilbert v. California, 388 U.S. 263 (1967) 9, 11
Harris v. New York, 401 U.S. 222 (1971) 11
Holt v. United States, 218 U.S. 245 (1910) 9
Miranda v. Arizona, 384 U.S. 436 (1966) 10n
People v. Rucker, 82 Cal. App. 3d 450, 147 Cal. Rptr. 144 (1978) 11
Schmerber v. California, 384 U.S. 757 (1966) 9, 11
United States v. Baird, 414 F. 2d 700 (2d Cir. 1969) 10
United States v. Bohle, 445 F. 2d 54 (7th Cir. 1971) 10
United States v. Dionisio, 410 U.S. 1 (1973) 11
United States v. Handy, 454 F. 2d 885 (9th Cir. 1971) 10
United States v. Sullivan, 274 U.S. 259 (1927) 14
United States v. Wade, 388 U.S. 218 (1967) 9
Walker v. Butterworth, 457 F. Supp. 1233 (D. Mass. 1978) 3, 10n, 12

Walker v. Butterworth, 599 F. 2d 1074 (1st Cir. 1979) 1, 3, 8, 9n, 10, 11
Walker v. Massachusetts, 429 U.S. 943 (1976) 3

Constitutional and Statutory Provisions.

United States Constitution
Fifth Amendment 2, 8, 9
Fourteenth Amendment 2
28 U.S.C. § 1257(3) 1
Mass. Gen. Laws c. 234, § 29 8n
2 Hawk. P.C. c. 43, § 4 8

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NO. .

FREDERICK BUTTERWORTH ET AL.,
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v.

TERRELL WALKER,
RESPONDENT.

Opinion Below.

The opinion of the court below (App. A) is reported at 599 F. 2d 1074 (1st Cir. 1979).

Jurisdiction.

The decision of the court below was rendered on June 7, 1979; however, the judgment was stayed for ninety days pending application to this Court for a writ of certiorari. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3).

Question Presented.

Whether requiring a criminal defendant personally to announce his peremptory challenges to the venire violates his Fifth Amendment right not to incriminate himself.

Constitutional Provisions Involved.

Fifth Amendment.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statement of the Case.

Prior Proceedings.

On December 13, 1973, Terrell Walker was indicted by a Suffolk County, Massachusetts, grand jury for the murder of a Boston police officer and for five armed robberies. He was convicted on August 14, 1974, after a jury trial held in Salem, Massachusetts,[1] and sentenced to life imprisonment on the murder charge and concurrent fifteen to twenty-five year terms on the armed robbery charges.

On appeal to the Massachusetts Supreme Judicial Court, the convictions were affirmed. *Commonwealth* v. *Walker*, 370 Mass. 548 (1976) (App. A). A petition for a writ of certiorari was denied by this Court on November 8, 1976. *Walker* v. *Massachusetts*, 429 U.S. 943 (1976).

Walker subsequently filed a petition for a writ of habeas corpus in the District Court for the District of Massachusetts which was denied. *Walker* v. *Butterworth*, 457 F. Supp. 1233 (1978) (App. B). He then appealed to the United States Court of Appeals for the First Circuit which, on June 7, 1979, reversed the order of the District Court and granted Walker's application for habeas corpus.[2] *Walker* v. *Butterworth*, 599 F. 2d 1074 (1st Cir. 1979) (App. C).

Statement of Facts.

Prior to the empanelment of the petit jury, the trial judge informed Walker and his counsel that, since this was a capital

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[1] This case was widely reported in the media since the victim's brother, also a Boston police officer, had been murdered in 1970 during an armed robbery. Therefore, venue for the trial was changed to Salem, Massachusetts, a rural community approximately sixteen miles northeast of Boston.

[2] The court's order, however, was stayed for ninety days to permit Butterworth to apply to this Court for a writ of certiorari.

case, pursuant to well-established procedure in the Commonwealth, Walker himself, would be required to exercise his peremptory challenges by announcing his satisfaction or dissatisfaction with each juror once the court had determined that the juror was otherwise qualified to serve. Walker did so by stating either "I am content," or "I challenge" after consulting with his counsel.[3]

The prosecutor, in his closing argument to the jury, commented on the court's requirement that Walker personally exercise his peremptory challenges.[4]

> I just want to say this to you. Ask yourself about this particular defendant. What do you think? Do you think he knew what he was doing when he stood up there and said, "I am content with this juror? I am content with this juror? I am content with this juror?" Do you think he knew what he was doing then?

Walker objected to the comment at the conclusion of the prosecutor's argument and requested a curative instruction. The trial judge agreed to inform the jury that Massachusetts tradition mandated that a defendant in a capital case personally announce his satisfaction or lack thereof with each juror and he did so at the outset of his lengthy instructions.

> In a first degree murder case many times the Court requires that the defendant make his own announcement rather than through his attorney as to whether or not he

[3]Counsel objected to the procedure on the ground that it might interfere with Walker's insanity defense by impressing the jurors with Walker's present competency.

[4]Seventeen days had elapsed from jury empanelment to closing arguments.

> wishes to challenge or whether or not he wishes to accept and announce that he is content with a particular juror that has been selected. In this case the Court required that the defendant himself, after consultation with his attorney, make the announcement personally as to whether or not he wished to challenge or whether or not he was content with the particular juror that might have been called and he announced his contentment in each instance individually or personally himself in the selection of his panel. So then again I put questions to you and inquiries and again you were accepted without challenge either by the Commonwealth or by the defendant, and you have been sworn to well and truly try the issues between the Commonwealth and the defendant according to the law and to the evidence.

Additionally, the trial judge instructed the jury that its verdict must be based only upon the evidence, that evidence ". . . is what you get from the lips of witnesses under oath together with any exhibits which [the court] permitted to be marked . . .", that argument of both the prosecutor and defense counsel was not evidence, and that its verdict must not be based upon ". . . speculation, guesswork, conjecture, or anything which may be the subject of pure imagination." Finally, in defining the defense of insanity the trial judge twice instructed that the jury was to consider only the defendant's mental capacities at the time he committed the offense.

At trial, the Commonwealth introduced evidence demonstrating that Terrell Walker and three others conspired to rob the Suffolk Loan Company, 1904 Washington Street, Boston, Massachusetts, and did carry out their plan on November 30, 1973, in the early afternoon. During the robbery, Walker shot and killed Boston Police Officer John D. Schroeder, who was in the loan company at the time.

Two of Walker's co-venturers, Nathaniel Williams and Anthony J. Irving, testified for the Commonwealth at the trial. By their testimony, the Commonwealth demonstrated that on the morning of the robbery, Walker, Williams, Irving and a woman identified only as "Sue" met at the girl's Monticello Street, Boston, apartment and discussed the forthcoming robbery.[5] Walker informed the others that the Suffolk Loan Company was the target, supplied Williams with a .38 caliber pistol and arranged for "Sue" to drive the getaway car. He also demonstrated to Williams how to operate the handgun and what to do once they entered the loan company. He further announced that he would carry a handgun as well.

Soon thereafter, Walker, Williams, and Irving entered the store, emptied the jewelry cases, and removed money from the cash register. Officer Schroeder was shot by Walker during the robbery.

The participants made their escape in "Sue's" car and divided the jewelry and money at a Boston housing project apartment. Walker was arrested by the Boston police later in the day at that apartment.

Several individuals who were present in the Suffolk Loan Company also testified for the Commonwealth. Isadore Margulis identified Walker as the youth who had shot Officer Schroeder in the neck, left the body and returned in a few minutes to rob him of his money and service revolver. Anastasio Kapfaskis, also present, identified Walker as the person who struggled with Schroeder over a gun and shot him in the neck. Two or three minutes later he observed Walker return to the body and, after searching it, remove a gun, badge and some money.[6]

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[5] Williams testified that Walker telephoned him earlier that morning asking him if he wanted to join him in an armed robbery and arranged to meet him at "Sue's."

[6] Others present testified similarly to the incident but were not able to identify the respondent as the killer of Schroeder.

Walker did not dispute the Commonwealth's evidence, but rather asserted that he was insane at the time he committed the charged offenses. In support of his claim, he offered the expert testimony of Dr. Frank Gatti, a psychiatrist, who had last examined him on May 6, 1972, approximately eighteen months before the offense. The May 6th consultation lasted less than two hours and was the only contact Gatti had with Walker. Nevertheless, Gatti opined that Walker was insane under the appropriate test employed in the Commonwealth.[7] He did admit, however, that when he did examine Walker, he did not feel his condition serious enough to warrant hospitalization.

Additionally, Walker called Dr. Guy Seymour, a clinical psychologist, who had extensively examined him five months after the offenses. He opined as well that Walker was not criminally responsible. The Commonwealth called no medical witnesses in rebuttal, choosing, rather, to rely upon the lay testimony admitted during its case in chief. Walker did not testify.

Reasons for Granting the Writ.

The petitioner submits that this petition for a writ of certiorari should be granted for the following reasons.

1. The decision of the Court of Appeals for the First Circuit represents a bizarre departure from this Court's recent decisions delineating the scope of the privilege against self-incrimination.

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[7] "A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law." *Commonwealth* v. *McHoul*, 352 Mass. 544, 546-547 (1967).

2. The decision of the Court of Appeals for the First Circuit is in conflict with a decision of another jurisdiction.

A COMPELLED PRE-TRIAL ANNOUNCEMENT BY A CRIMINAL DEFENDANT WHICH DEMONSTRATES ONLY HIS SATISFACTION OR DISSATISFACTION WITH EACH JUROR AS THEY ARE CHOSEN IS NOT WITHIN THE SCOPE OF THE FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION.

Massachusetts has traditionally required that in a capital case the defendant personally announce his peremptory challenges to the jurors as they are drawn for his venire. See *Commonwealth* v. *Millen*, 289 Mass. 441, 477 (1935), *cert. den.* 295 U.S. 765 (1935).[8] The tradition has its roots in the common law and acknowledges the vital importance of the right to an impartial jury by requiring the defendant's personal involvement in the selection of those who will judge him. See 2 Hawk. P.C. c. 43, § 4.

In reversing the order of the District Court and granting the respondent's application for a writ of habeas corpus, the Court of Appeals held that to require the respondent to announce his own peremptory challenges during jury empanelment unconstitutionally compelled him to communicate his mental state and thought processes to the jury. This compelled communication infringed his privilege not to incriminate himself since it rebutted his insanity defense. *Walker* v. *Butterworth*, *supra*, at 1082. The court's decision, however, misconstrues numerous prior decisions of this Court and unwarrantedly expands the protection of the Fifth Amendment to encompass

[8] By statute, a defendant charged with a crime punishable by death or life imprisonment is entitled to twelve peremptory challenges. Mass. Gen. Laws c. 234, § 29.

compelled statements which are used for purposes other than their content. Moreover, in the circumstances of this case, the First Circuit's decision is even more bizarre since the respondent's statements had little, if any, evidentiary value.[9]

A. *The Fifth Amendment Prohibits Only Compelled Statements which are Offered for the Truth of Their Content.*

In defining the scope of the privilege against self-incrimination, this Court has consistently held that the privilege is a bar against compelled statements which are used for their communicative content. See *Holt* v. *United States*, 218 U.S. 245, 253 (1910). Thus, compelling a defendant to give a sample of his blood, *Schmerber* v. *California*, 384 U.S. 757, 765 (1966), or to stand in a line-up for the purposes of identification, *United States* v. *Wade*, 388 U.S. 218, 223 (1967), or to exhibit certain clothing in the courtroom, *Holt* v. *United States*, *supra*, at 253, or to give an exemplar of his handwriting, *Gilbert* v. *California*, 388 U.S. 263, 266 (1967), does not implicate the protection of the Fifth Amendment. Rather, the privilege against self-incrimination prohibits governmental ". . . compulsion to disclose any *knowledge* [an individual] might have." *United States* v. *Wade*, *supra*, at 222 (emphasis supplied).

[9] The First Circuit attempts to buttress its opinion that the respondent's statements were evidence by pointing to the prosecutor's summation where he argued that the respondent's insanity defense was rebutted by his ability to exercise his own peremptories. *Walker* v. *Butterworth*, *supra*, at 1082-1083. However, the fact that the prosecutor stated that this was evidence does not make it so. The prosecutor's conduct, therefore, must be analyzed in terms of due process. See *Donnelly* v. *DeChristoforo*, 416 U.S. 637 (1974). The court below, however, rejected this approach.

In the instant case, the First Circuit reasoned that Walker's statements "I am content" or "I am not content" conveyed to the jury a subtle message which was directly relevant to Walker's sanity.

> . . . in the context of an insanity defense, the words necessarily take on an additional meaning and relate important and incriminating information. The content of the words and the mental processes that they necessarily embodied and revealed conveyed an inescapable message to the jury.[10]

Walker v. *Butterworth*, *supra*, at 1082-1083. Nevertheless, the privilege does not carry with it any greater significance merely because the defendant asserts that he was insane at the time he committed the offense. Thus, statements made to an examining psychiatrist are not within the scope of the privilege since their use is as real or physical evidence rather than as testimonial or communicative evidence. See *United States* v. *Baird*, 414 F. 2d 700, 703 (2d Cir. 1969). See also *United States* v. *Bohle*, 445 F. 2d 54, 66 (7th Cir. 1971); *United States* v. *Handy*, 454 F. 2d 885 (9th Cir. 1971).[11]

In a recent case involving similar facts, the California Court of Appeals reached a decision in direct conflict with the First

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[10] The District Court stated that although it was "conceivable that a juror could infer past sanity from a demonstration of present competency, the logical leap is a substantial one." *Walker* v. *Butterworth*, *supra*, 457 F. Supp. at 1240.

[11] The First Circuit drew a distinction between compelled statements to a psychiatrist and the statements in this case on the ground that the former are of "great importance" on the issue of sanity. *Walker* v. *Butterworth*, *supra*, at 1084. This Court, however, has yet to recognize an exception to the privilege based upon the "importance" of the evidence. Rather, the decision in *Miranda* v. *Arizona*, 384 U.S. 436, 460 (1966), seems to indicate that such an exception would find little support.

Circuit's decision in the instant case. *People* v. *Rucker*, 82 Cal. App. 3d 450, 147 Cal. Rptr. 144 (1978). There, in order to rebut the defendant's defense of diminished capacity, the prosecution introduced over the defendant's objection statements made by him during a police station interrogation in which his continued requests for counsel were ignored. The Court of Appeals affirmed the introduction of the statements since the clear use of the statements was to demonstrate to the jury the defendant's ". . . clarity of voice, thought processes and intonation." *Id.* at 148. Thus, it was not the content of what the defendant had said that was relevant, but rather the manner in which he had said it. Therefore, the court reasoned that the defendant's statements fell directly within the scope of this Court's decisions in *Schmerber* v. *California*, *supra*; *Gilbert* v. *California*, *supra*; and *United States* v. *Dionisio*, 410 U.S. 1 (1973). The First Circuit, however, held these decisions to be inapposite. *Walker* v. *Butterworth*, *supra*, at 1083.

Thus, it is apparent that the First Circuit has totally misconstrued the scope of the privilege against self-incrimination and made it applicable to a defendant's compelled statements which are used for purposes other than to demonstrate the truth of their content. Cf. *Harris* v. *New York*, 401 U.S. 222 (1971). While the facts in this case are unique, the effect of the First Circuit's decision is nevertheless far-reaching, for its logical extension would prohibit the use of otherwise highly probative evidence of a defendant's mental faculties and leave the jury to decide the issue of mental responsibility on the often conflicting, abstract opinions of psychiatric experts.

B. *The Effect of the Respondent's Compelled Statements on the Successful Presentation of his Insanity Defense was De Minimis.*

At his trial, the respondent offered the testimony of two expert witnesses, a psychiatrist and a psychologist. The psychiatrist had last examined the respondent eighteen months before the crime and for less than two hours. The psychologist did not examine the respondent until five months after the crime. Yet, the First Circuit found that the respondent's personal announcement of his peremptory challenges and the prosecutor's improper comment on it to be error of constitutional significance which necessitated granting a writ of habeas corpus. Even assuming that the respondent's privilege against self-incrimination was infringed by this Massachusetts tradition, error, if any, was harmless beyond a reasonable doubt. See *Chapman* v. *California*, 386 U.S. 18, 21-24 (1967).

While the First Circuit had little trouble concluding that the respondent's statements and the prosecutor's comment undercut the respondent's defense of insanity, it ignored the fact that the central issue in the case was insanity at the time the offense was committed, not competency at the time of trial. It was this fact that caused both the Massachusetts Supreme Judicial Court, *Commonwealth* v. *Walker*, *supra*, at 563, and the District Court, *Walker* v. *Butterworth*, *supra*, at 1240, to conclude that the respondent's statements were not relevant to the issue of sanity. In finding the statements prejudicially relevant, the First Circuit has engaged in unwarranted speculation. See *Buchalter* v. *New York*, 319 U.S. 427, 431 (1943).

Moreover, whatever inference the jury drew from the respondent's statements could also readily be drawn from his failure to disrupt the proceedings, his ability to consult with his counsel, or his apparent comprehension of the nature of the proceedings. The logical extension of the First Circuit's decision would necessitate isolating a defendant whose defense is insanity from the jury's view so that no inferences at all could be drawn from his conduct during the trial.[12]

Finally, in the trial judge's charge to the jury, he instructed that it decide the case only upon the evidence presented. He further defined evidence as that heard from the witness stand and that represented in the exhibits. Additionally, he instructed that the prosecutor's argument was not evidence, that personal announcement of peremptory challenges was traditional in Massachusetts capital cases, and that in deciding whether the respondent was criminally responsible the jury should consider the respondent's mental state at the time he committed the crime.

In light of the marginal significance of the respondent's statements and the clear instructions by the trial judge, it is apparent that requiring the respondent to announce his challenges did not amount to constitutional error which mandated relief in this collateral attack.[13]

Furthermore, to hold that such a neutral expression of satisfaction or dissatisfaction with potential jurors is encompassed by the privilege ignores the requirement of this Court that "[i]n order to invoke the privilege it is necessary to show that the compelled disclosures will themselves confront the claimant with 'substantial hazards of self-incrimination.'" *California* v. *Byers*, 402 U.S. 424, 429 (1971). Petitioner suggests that the decision of the First Circuit is totally at odds with the decisions of this Court and, in the words of Mr. Justice Holmes,

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[12] The First Circuit attempted to rebut this argument by reasoning that the statements were compelled while the respondent's other actions were voluntary. Yet, this overlooks the fact that the respondent's very presence in the courtroom is compelled as well.

[13] That the Massachusetts procedure might seem archaic and irrational does not alone warrant its being found unconstitutional. See *Brooks* v. *Tennessee*, 406 U.S. 605, 613-616 (1972) (Burger, C.J., dissenting).

amounts to "an extreme if not extravagant application of the Fifth Amendment." *United States* v. *Sullivan*, 274 U.S. 259, 263-264 (1927).

Conclusion.

For the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Appendix A.

DECISIONS

OF THE

SUPREME JUDICIAL COURT

OF

MASSACHUSETTS

COMMONWEALTH *vs.* TERRELL WALKER.

Suffolk. December 1, 1975. — June 24, 1976.

Present: HENNESSEY, C.J., REARDON, QUIRICO, BRAUCHER, KAPLAN, WILKINS, & LIACOS, JJ.

Homicide. Search and Seizure. Constitutional Law, Search and seizure. *Probable Cause. Arrest. Practice, Criminal,* Production of evidence, Challenge of jurors, Fair trial, Instructions to jury, Examination of jurors, Location of defendant in court room, Capital case. *Identification. Evidence,* Other offense, As to credibility of witness, Cross-examination, Judicial discretion, Of insanity. *Insanity.*

At a murder trial, evidence that police officers went to an apartment where the defendant was hiding, knocked loudly and demanded entry, that they did not use trickery or threats to gain entrance, and

that the lessee of the apartment admitted the police because she was afraid of the defendant warranted a finding that her consent to the entry and search was freely and voluntarily given. [554-556]

Where findings were warranted that the lessee of an apartment gave her consent to a search of a bedroom and that police officers who had observed someone peering from the bedroom window were justified in entering the bedroom to ascertain whether any person was in that room, there was no error in the denial of a motion to suppress guns found in plain view in the bedroom. [556-558]

At a murder trial, where the lessee of an apartment voluntarily consented to police entry, information obtained from the lessee could be used as a basis for probable cause to arrest two codefendants and there was no error in admitting testimony of the two codefendants and another who was present in the apartment at the time of the entry. [558-559]

Where there was probable cause to arrest a defendant for murder and robbery and where, even if there had not been probable cause, the arresting officer, who knew of the existence of two outstanding warrants against the defendant, was justified in making the arrest, there was no error in admitting in evidence a pair of sneakers taken from the defendant at the time of his arrest. [559-560]

At a murder trial, there was no error in the admission of testimony by a police officer that at the time he arrested the defendant he was aware of two outstanding warrants issued against the defendant previously, where the testimony was not admitted as probative of the contents of the warrants but only to show probable cause to arrest the defendant. [560-561]

At a murder trial, where consent had been found to the police entry of an apartment, there was no error in the exclusion of various questions designed to show that testimony of the lessee was "tainted" by an illegal entry. [561-562]

There was no abuse of discretion in a judge's denial of various motions to produce tapes of interviews with a witness or the grand jury testimony of a witness for the purpose of refreshing the recollection of police interviewers. [562-563]

At the trial of an indictment for murder, there was no merit in a contention by the defendant that his constitutional rights against self-incrimination and to a fair, impartial jury were violated by the requirement that the defendant, after consultation with his attorney, personally announce his contentment or dissatisfaction with prospective jurors even though the defendant raised an insanity defense; the prosecutor's reference in his closing argument to the defendant's exercise of his peremptory rights, though better omitted, was not prejudicial to the defendant. [563]

At a murder trial a witness's out-of-court identification of the defendant during a jury view of the scene eight months after the crime was admissible where the witness's identification was made spontaneously during a chance encounter, despite the fact that the witness had not been able to identify the defendant on the day of the crime. [563-565]

At a murder trial there was no error in the admission of a witness's out-of-court identifications of the defendant from photographs and at a lineup where there was nothing impermissibly suggestive in either procedure and where the witness's equivocal identification at

the lineup was brought to the jury's attention; there was no error in the judge's failure to make explicit findings as to whether an independent basis existed for the witness's in-court identification of the defendant where he had made specific findings that the witness's out-of-court identifications were proper. [566-568]

At a trial for murder and robbery, a witness's testimony that he and the defendant had a stolen car which they decided not to take to the scene of the robbery was admissible where any prejudice to the defendant was outweighed by the probative value of the statement on the issue of criminal intent. [568-569]

At a murder trial, a mistrial was not required by the fact that a police officer testified as to a witness's identification of the defendant and the testimony was then struck, where the judge gave cautionary instructions at the first opportunity and questioned the jurors regarding any influence or prejudice the statement may have created in their minds against the defendant. [569-570]

Where a defendant had purportedly impeached a witness through use of a portion of a transcript of the witness's pre-trial testimony, there was no error in allowing the Commonwealth to introduce in evidence another portion of the transcript to show that the specified few responses in her pre-trial testimony, to which the defendant had referred, were not inconsistent with her trial testimony. [570-571]

At a trial for first degree murder where it was stipulated that a witness would be permitted to plead guilty to murder in the second degree if he testified against the defendant, there was no error in the exclusion of defense counsel's questions to the witness as to his motivation for testifying; nor was there error in the exclusion of questions as to the witness's refusal to testify at a pre-trial hearing on a motion to suppress. [571-572]

At a murder trial, there was no error in the refusal of the trial judge to ask prospective jurors whether they would give greater weight to the testimony of a police officer than to that of a private citizen nor in his refusal to allow the defense counsel personally to ask voir dire questions of the prospective jurors. [572-573]

At a trial for first degree murder and robbery, the judge did not abuse his discretion in refusing to allow the defendant to sit at the counsel table rather than in the prisoner's dock. [573-574]

There was no error in a criminal trial in the judge's remarks in his instructions that the defendant could appeal the jury's verdict but the Commonwealth could not where, taken as a whole, the judge's instruction was designed to protect the defendant from prejudice by explaining why the defense counsel took exceptions to various rulings and the prosecutor did not. [574-576]

At a murder trial, there was no error in allowing a witness, whose in-court identification of the defendant was excluded because an impermissibly suggestive photographic display had been shown to her prior to trial, to testify that she could identify two men at the scene of the crime who did not shoot the victim and that they were not in the court room. [576-577]

At a murder trial in which the defendant introduced expert testimony that he was insane at the time of the crime, the judge correctly instructed the jury on the use of the presumption of sanity and on the Commonwealth's burden of proving sanity beyond a reasonable doubt. [577-582]

Upon a verdict of guilty on indictments charging first degree murder and armed robbery, where there was evidence at trial that the defendant engaged in a carefully considered, intelligent plan to commit the crimes, even though two qualified experts expressed the opinion that the defendant was insane at the time of the crimes and the Commonwealth produced no contrary testimony, the defendant's evidence as to insanity was not so compelling as to require reversal under G. L. c. 278, § 33E. [582-583] HENNESSEY, C.J. (dissenting, with whom KAPLAN, J., joined). LIACOS, J., concurring.

INDICTMENTS found and returned in the Superior Court on December 13, 1973.

A pre-trial motion to suppress evidence was heard by *Taveira*, J., and the cases were tried before him.

Norman S. Zalkind & Eric D. Blumenson (*Stephen L. Saltonstall* with them) for the defendant.

Newman A. Flanagan, Assistant District Attorney, for the Commonwealth.

HENNESSEY, C.J. The defendant was tried before a jury on five indictments charging him with murder in the first degree and armed robbery, and was convicted on all five indictments. He was sentenced to life imprisonment on the murder charge and to fifteen to twenty-five years' imprisonment on each of the armed robbery indictments, the terms of years to be served concurrently with the life term. The defendant prosecutes these appeals under G. L. c. 278, §§ 33A-33G.

We find no error in the rulings of the trial judge, and consequently we affirm the judgments. Further, a majority of the Justices participating in this decision are of the opinion that "justice in [this] particular case" (*Commonwealth* v. *Geraway*, 364 Mass. 168, 184 [1973] [Tauro, C.J., and Braucher, J., dissenting]) does not require that we exercise the discretion vested in us under G. L. c. 278, § 33E.[1]

[1] The author of this opinion is compelled to express the view, which can be found in a dissent *infra*, that the judgment should be reversed, the verdicts set aside, and a new trial granted in this case through application of our discretionary power under G. L. c. 278, § 33E. See *Commonwealth* v. *Kostka*, *ante*, 516, 539-540 (1976) (Hennessey, C.J., and Kaplan, J., dissenting).

We turn now to a discussion of the defendant's numerous assignments of error seriatim.

The facts are as follows. Sometime around noon on November 30, 1973, three men with guns robbed a pawnshop on Washington Street in Boston. While the robbery was in progress, one of the armed men struggled momentarily with and killed a plain-clothed Boston police officer who happened to be inside the pawnshop at the time.

Responding to the robbery and murder, several police officers, including Detective Louis McConkey of district 2 of the Boston police department, showed the customers and employees of the pawnshop numerous photographs of possible suspects. Tentative identifications of at least two individuals, Terrell Walker and his brother, Arnold, were obtained.

In the late afternoon of that same day Detective McConkey and a contingent of plain-clothed police officers from districts 2 and 11 sought entry into a Columbia Point housing project apartment leased to Darlene Freeman, Arnold Walker's fiancée.[2] Among the officers accompanying Detective McConkey was Detective Frank Olbrys, who was aware of two outstanding warrants for the arrest of Terrell Walker.

The police officers surrounded the ground level apartment, knocked loudly on the door, and demanded entry. Although there was no immediate response from within, the police deduced that the apartment was occupied because they could hear noises emanating from inside the apartment and because someone was observed peering out a side bedroom window after peeling back the corner of a drawn shade. A passkey was obtained to facilitate the police entry, but it was not until a bolt on the inside of the apartment door was released by Ms. Freeman that the police actually found themselves inside.

[2] Detective McConkey knew Ms. Freeman, having talked to her approximately two or three months prior to November of 1973 on an unrelated matter. At that time he learned that Ms. Freeman was Arnold Walker's fiancée, and that Terrell Walker possessed a firearm.

Considerable confusion ensued. It is at least clear, however, that the defendant was asked his name and responded falsely, and that Detective Olbrys identified him as Terrell Walker and placed him under arrest. Detective McConkey took Ms. Freeman aside to find out what she might know about the pawnshop incident, while other officers fanned out throughout the apartment to gather up any remaining individuals they might discover therein. During the course of Ms. Freeman's conversation with Detective McConkey it was revealed that a gun or guns were in one of the bedrooms. Two guns were eventually recovered from a bedroom, and various other items of evidence connected with the pawnshop robbery were discovered and seized during the police occupation of the apartment.[3] Arnold Walker (now also under arrest) and other persons in the apartment, including Ms. Freeman and the defendant, were taken to police headquarters. From Ms. Freeman investigating officers learned the identity of two individuals allegedly involved with the defendant in the robbery and murder. Nathaniel Williams and Anthony Irving were later apprehended with the murder weapon among their possessions.

An extensive and comprehensive hearing was held before trial to consider the defendant's motion to suppress the evidence obtained by the police at Ms. Freeman's apartment.[4] The judge found that Ms. Freeman had know-

[3] One of the guns seized was the police department revolver issued to the slain Boston police officer; also taken were a medallion and three rings found under a mattress in one of the bedrooms, a hatful of rings and watches discovered under a chair in one of the bedrooms, and a ring found in the pocket of a pair of trousers. With the exception of the two guns, these items of evidence were suppressed from introduction at trial by the judge, who found at a preliminary hearing on the defendant's motion to suppress that Ms. Freeman had not given any general consent to the search of her apartment and that these items were not in plain view.

[4] The judge found as a preliminary matter that the defendant had standing to object to the search of the apartment. See *Commonwealth* v. *Deeran*, 364 Mass. 193, 195 (1973); *Commonwealth* v. *Dirring*, 354 Mass. 523, 531-533 (1968); *Brown* v. *United States*, 411 U.S. 223, 229 (1973); *Jones* v. *United States*, 362 U.S. 257, 267 (1960).

ingly, intelligently and voluntarily consented to the police entry and presence in her apartment and that the two guns found in one of the bedrooms were found by the police in plain view. The judge further found that the defendant had been arrested on probable cause and also on the two warrants for his arrest which were outstanding. Ms. Freeman's later statements to the police, in which she inculpated Williams and Irving, were found by the judge to be the result of an intervening, independent act on her part to supply information to the police, and were not deemed to be tainted in any way by the entry and search of her apartment. We have mentioned elsewhere in this opinion the judge's disposition with regard to other items of real evidence seized at the apartment. See note 3 *supra*.

1. It is uncontroverted that the police had no search warrant covering Ms. Freeman's apartment.[5] The paramount question then becomes, broadly, Has the prosecution carried its burden of showing the existence of some one of the " '. . . few specifically established and well-delineated' " exceptions to the warrant requirement? *Vale* v. *Louisiana*, 399 U.S. 30, 34 (1970), quoting from *Katz* v. *United States*, 389 U.S. 347, 357 (1967).

The prosecution demonstrated, primarily through the testimony of Detective McConkey and Ms. Freeman, that the police entered her apartment and confiscated at least the two guns which were introduced in evidence as a result of Ms. Freeman's consent to that entry and search. That Ms. Freeman, as lessee of the apartment, and one on the premises at the time of the entry and search, could give a valid consent is not disputed. The issue narrows, we think, to whether, in all the circumstances, her consent to the entry and search can be said to have been freely and voluntarily given. *Commonwealth* v. *Mendes*, 361 Mass. 507, 512

[5] The record does not require a finding that the police went to the apartment for the purpose of searching it. For all that appears, it is reasonable to assume that the police initially went there only to question Ms. Freeman. The show of strength by the police is not inconsistent with this assumption in view of the police knowledge that three armed men had already killed one police officer and were still at large.

(1972). *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 222 (1973). *Bumper* v. *North Carolina*, 391 U.S. 543, 548 (1968).

Decisions of this court and of the United States Supreme Court make it clear that "consent freely and voluntarily given" means consent unfettered by coercion, express or implied, and also something more than mere "acquiescence to a claim of lawful authority." *Bumper* v. *North Carolina*, *supra* at 549. The fact that a person is not informed by the police that he has an unqualified right to refuse to consent to an entry or search is "a factor to be taken into account" on the issue of voluntariness, but is by no means determinative of that issue. *Schneckloth* v. *Bustamonte*, *supra* at 248-249.

In the instant case, determined as the police were to enter the Freeman apartment, they did not utilize trickery or threats to gain entrance to the dwelling. In considering all the circumstances, we must take into account not only the conduct of the police but also the conduct and statements of persons inside the apartment prior to the police entry.

At the preliminary hearing the judge would have been warranted in finding that, after the loud knocks on the apartment door, someone inside the apartment went to a bedroom window, pulled the shade back, and informed those inside the apartment that there were "cops" all around the building. Ms. Freeman's three children were watching television in the apartment at that time. The apartment occupants argued with the defendant, who expressed his intention not to go to jail by stating that "[t]he only way to get me is take me out of here in a pine box." There was talk of guns by the defendant. A shootout seemed imminently possible. Ms. Freeman was frightened — not of the police, but of the defendant and what he might do to avoid arrest.

We conclude, as the trial judge did, that it was this atmosphere of tension and fear of the defendant which prompted Ms. Freeman to admit the police in the first instance. In these circumstances the judge was warranted in

concluding that her consent was freely and voluntarily given since the only element of fear was injected by the defendant's conduct, which was unknown to the police at the time they sought entry into the apartment. In view of the limited information possessed by the police before they entered the apartment and the spontaneity of their action as the situation developed, the circumstances here are distinguishable from those in the case of *Commonwealth* v. *Forde*, 367 Mass. 798 (1975), and more closely approximate the circumstances surrounding the warrantless entry into an apartment which we recently upheld in *Commonwealth* v. *Moran*, *ante*, 10 (1976). There was no error.

2. We turn now to the judge's findings and rulings as to the search conducted by the police once they were inside the Freeman apartment. Two independent grounds were offered to justify the seizure of the guns which were found in one of the apartment bedrooms. On the one hand, the judge found that these guns were discovered in plain view by one of the officers who entered the bedroom to ascertain whether that room was the one from which someone had been observed peering out; on the other hand, the judge found that Ms. Freeman expressly consented to a search of the bedroom for the guns while she was conversing with Detective McConkey.

In our view the judge could properly rely on either of the two grounds cited by him. A finding was warranted that Ms. Freeman gave consent to the search of the bedroom for guns, and this permissible finding justified the police action.

Even if we were to assume, as urged by the defendant, that Ms. Freeman gave no consent to search the bedroom, we conclude that the search also was justified on the second ground cited by the judge, for it is clear that in light of what the police observed and learned immediately on entering the apartment, they then were justified in entering the bedroom at least for the purpose of ascertaining whether there was any other person in that room. This investigation generally was justified in the interest of safety of the police and the occupants of the apartment, and par-

ticularly justified by the observation that someone had earlier looked out of that window toward the police outside. Since the police were lawfully in the bedroom, we need only consider whether the requirements of plain view were met. *Coolidge* v. *New Hampshire*, 403 U.S. 443, 465-473 (1971).

The plain view doctrine requires prior police justification for an intrusion in the course of which an officer inadvertently comes across incriminating evidence. The "prior justification" language is merely another way of articulating the necessity for "some . . . legitimate reason for being present unconnected with a search directed against [an] accused." *Coolidge* v. *New Hampshire*, *supra* at 466. The inadvertence requirement simply lends credibility to the doctrine by ensuring that only evidence which the police did not *anticipate* or *know* to be at the locus of a search will be seized without a warrant. When the plain view doctrine is relied on to justify a warrantless seizure of evidence, attention must be paid also to seeing that the police, in full possession of probable cause to believe that incriminating evidence is present in a particular place, have not waited until an opportune moment to "place themselves in a position to gain a plain view of the evidence." *Commonwealth* v. *Forde*, 367 Mass. 798, 809 (1975) (Hennessey, J., concurring in result).

The testimony before the trial judge on the motion to suppress revealed that Detective McConkey knew that the Freeman apartment was not the residence of the defendant. No officer testified to a reasonable belief that the defendant would be found within the apartment. There was no evidence that the police officers involved even anticipated an occasion to search the Freeman apartment, much less that they knew or anticipated that evidence related to the pawnshop robbery and murder might be located there. As for the inadvertence requirement, in making his finding on plain view the judge would have been justified in relying on the testimony of Detective Richard Driscoll, as corroborated by other police officers present at the time, that Detective Driscoll discovered the uncon-

cealed guns, one of which he immediately recognized as a Boston police officer's revolver, while turning to leave the bedroom after checking the window. We conclude that it was not error to admit the two guns in evidence.

3. The defendant based his next two related assignments of error on the premise that no valid consent to enter the Freeman apartment could be demonstrated in all the circumstances. That being the case, he argues, all evidence obtained as a product of the "illegal" police presence would be inadmissible at trial absent a showing that it was independently arrived at. Specifically, he contends that the police could not base probable cause to arrest Nathaniel Williams and Anthony Irving on the information obtained from Ms. Freeman at police headquarters after the "illegal" entry, nor could the prosecution use the testimony of these two accomplices or of Anthony Dobson, who was in the apartment both earlier on the day of November 30, 1973, and during the "illegal" police entry. Cf. *Commonwealth* v. *Bumpus*, 362 Mass. 672, 674-675 (1972).

These two assignments of error fail even without application here of the familiar "fruit of the poisonous tree" approach.[6] *Commonwealth* v. *Spofford*, 343 Mass. 703, 707-708 (1962). *Wong Sun* v. *United States*, 371 U.S. 471, 487-488 (1963). *Nardone* v. *United States*, 308 U.S. 338, 340-341 (1939). *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385, 392 (1920). That principle is essentially concerned with whether the use of secondary evidence — that evidence which may have been arrived at through exploitation of the primary illegality — will in any way encourage police misconduct. We have upheld the trial judge's ruling

[6] The trial judge chose to rest his denial of the defendant's motion to suppress Ms. Freeman's statements and the testimony of Williams and Irving on the finding that these statements resulted from an "intervening, independent act" on her part to supply information to the police. This approach seems sound, but, in light of our agreement with the trial judge that there was no primary illegality, it is unnecessary for us to pursue it further. The same can be said of the defendant's claim regarding Anthony Dobson's testimony.

We do note that Ms. Freeman was not under arrest when she gave information to the police later that same day. Compare her situation with the facts in *Michigan* v. *Tucker*, 417 U.S. 433 (1974).

on the voluntariness of Ms. Freeman's consent to the police entry of her apartment, thus removing any stigma of "taint" from whatever information Ms. Freeman later gave, and from the testimony elicited from the three other witnesses.

4. The defendant contends that it was error to deny his motion to suppress from evidence a pair of Converse sneakers taken from him after his arrest.[7] In pressing this contention, the defendant says that his arrest was unlawful (1) because the police entered a dwelling without either an arrest or a search warrant; (2) because there was no probable cause to believe that the defendant was in the apartment; and (3) because the police did not have probable cause to believe that the defendant had committed a crime.

We have already disposed of the issue as to the police entry into the apartment. Beyond this, the trial judge concluded that the sneakers were properly taken as part of a legitimate search incident to arrest. He based his conclusion on the alternatives that the defendant was arrested on probable cause relating to the pawnshop robbery and murder, and that there were two outstanding warrants for the defendant's arrest, the existence of which were known to the arresting officer. We fully agree with the trial judge's conclusions as to both grounds on which he relied.[8]

[7] The sneakers were a material item of evidence linking the defendant with the crime since the slain policeman's murderer, after the shooting and at a time when considerable blood was on the floor of the pawnshop, straddled the body and removed the officer's wallet and service revolver. Impressions from the tread pattern of the murderer's sneakers, found in dried blood on certain tiles from the floor of the pawnshop, could have been made by the sneakers worn by the defendant at the time of his arrest. Additionally, expert testimony showed that there were small particles of dried human blood, type O, on the defendant's sneakers; the slain policeman had type O blood.

[8] Even if the police purported to act under the warrants, and seized the sneakers pursuant to their investigation of the murder and robbery, which was unrelated to the warrants, no invalidity of the seizure is established since there was probable cause relating the defendant to the murder and robbery. See *Commonwealth* v. *Tarver*, 369 Mass. 302, 306, 308 (1975).

Even if we were to agree with the defendant's contention that there was no probable cause to arrest him on the murder and robbery charges then being investigated, there was testimony by at least two officers present at the apartment that they were aware of two extant warrants for the defendant's arrest.[9] One of the officers who testified to a knowledge of the existence of these two warrants was, in fact, the complaining officer in connection with one of the two warrants. This officer further testified, over objection and exception of the defendant, that while on patrol a week or two before November 30, 1973, he had seen the defendant, and that the defendant had fled when the officer got out of his vehicle to apprehend him. It was this officer who identified the defendant and placed him under arrest after the entry into Ms. Freeman's apartment.

The legality of the defendant's arrest in the circumstances described above is beyond question. The police need not carry arrest warrants around on their persons. Compare *Commonwealth* v. *Bowlen*, 351 Mass. 655, 659-660 (1967), with Mass. R. Crim. P. 5 (c) (3) (Tent. Final Draft, Feb. 1976). This is not a case where law enforcement officers employed some ruse or acted in bad faith to conceal an absence of probable cause to arrest an individual. See *Wilson* v. *United States*, 325 F.2d 224, 225-226 (D.C. Cir. 1963), cert. denied, 377 U.S. 1005 (1964). Cf. *Bumper* v. *North Carolina*, 391 U.S. at 549 n.14; *Mapp* v. *Ohio*, 367 U.S. 643, 644-645 (1961). "Unlike probable cause to search, probable cause to arrest, once formed will continue to exist for the indefinite future, at least if no intervening exculpatory facts come to light." *United States* v. *Watson*, 423 U.S. 411, 449 (1976) (Marshall, J., dissenting).

5. The defendant challenges the trial judge's admission in evidence at the hearing on the motion to suppress the testimony of Detective Frank Olbrys that he was aware of the existence of two warrants issued previous to the defend-

[9] The defendant has not argued that there was no probable cause for the issuance of these two warrants.

ant's arrest. This testimony was accepted on the issue of probable cause to arrest the defendant, and was admitted only to show the knowledge of the arresting officer and to determine whether he acted prudently in the circumstances. The defendant's challenge to the admission of this testimony, bottomed as it was on the best evidence rule, has no merit. The oral testimony was not received as probative of the contents of the arrest warrants. It is well settled that the rule has no application to an attempt to show, among other facts, the existence of a document or action taken by persons in reliance on a document's existence. See W.B. Leach & P.J. Liacos, Massachusetts Evidence 263 (4th ed. 1967); K.B. Hughes, Evidence § 404 (1961).

6. Several of the defendant's allegations of error relate to the correctness of excluding certain questions asked by defense counsel at the suppression hearing. The excluded questions were designed to show that the police "exploited" their "illegal" entry of the Freeman apartment by interrogating Ms. Freeman to obtain further evidence regarding participants in the crimes. In the same vein, the judge denied the defendant's motions to produce a tape of the Freeman interview by police, to listen to the tape in camera, and to produce the tape and statements of Ms. Freeman for the purpose of refreshing the recollection of the police interviewers. Also excepted to is the denial of the use of Ms. Freeman's grand jury testimony to refresh the recollection of one of the police interviewers, and the striking of testimony of one officer to the effect that Ms. Freeman had told certain officers, on the way to police headquarters, that someone had taken some of the fruits of the robbery "and gone south."

We have fully examined the pertinent portions of the transcript relating to these assignments of error. The trial judge was correct in his rulings on the evidentiary matters and on the several motions. Since the trial judge concluded that there was no primary illegality in the police conduct, and that Ms. Freeman voluntarily consented to the police entry of her apartment, the attempt to show

"taint" could not have been material to the judge's ultimate conclusion.

At any rate, the defendant had ample opportunity to examine Detective McConkey, Sergeant Frank Mulvey, and the head of the Boston police department homicide unit, as to the circumstances of Ms. Freeman's questioning and the information obtained from her. The only questions excluded by the judge were either leading or called for a hearsay response by the witness McConkey. With respect to one question an offer of proof was made to the judge, but in light of the expected testimony and our conclusion that Ms. Freeman's statements were not tainted, we do not see how the defendant was prejudiced. The witness Mulvey demonstrated through his response to the questioning of defense counsel that he really "couldn't say" whether Ms. Freeman specifically mentioned Williams and Irving by name, and defense counsel was fully permitted to elicit from the witness the few particulars he could recall concerning Ms. Freeman's questioning.

The police tapes were the subject of a pre-trial motion for production which was denied by the judge. They were not utilized by the prosecution for any purpose during the hearing on the motion to suppress. There is nothing before us to show that the tapes contained statements inconsistent with the testimony of the witness in court. We have said in the past, and we reaffirm that principle here, that a defendant does not have an absolute right to have material of this nature produced for his use or inspection at trial. This is a matter which ordinarily rests in the trial judge's sound discretion. *Leonard* v. *Taylor*, 315 Mass. 580, 583-584 (1944), quoting from *Goldman* v. *United States*, 316 U.S. 129, 132 (1942). But cf. *Commonwealth* v. *Marsh*, 354 Mass. 713, 721-722 (1968). Where notes, memoranda, tapes or the like have not been used to refresh a witness's recollection, they, likewise, are not automatically to be made available to the defense, especially when their use would be ostensibly for the purpose of refreshing the memory of some other witness. This is the clear implication of our reasoning in *Commonwealth* v. *Guerro*, 357 Mass. 741,

756-757 (1970), and nothing said by this court with regard to grand jury minutes in *Commonwealth* v. *Stewart*, 365 Mass. 99, 105-106 (1974), can be construed to the contrary.

7. The defendant was required personally to exercise his peremptory rights in selecting the jury. He was directed to say either "I am content" or "I challenge." The use of this procedure is denominated error in that it violated the defendant's rights against self-incrimination and to a fair, impartial jury. Further, the defense cites prejudice in the prosecutor's reference to the defendant's exercise of these rights during his closing argument to the jury.[10]

We reject this claim of error. The practice used in this Commonwealth in cases of murder in the first degree to require a defendant, after consultation with his attorney, personally to announce his contentment or dissatisfaction with prospective jurors is sound. The practice does not require additional justification simply because the defense to the indictments is that the defendant, *at the time of commission of the offense*, was not legally responsible for his actions. *Commonwealth* v. *Millen*, 289 Mass. 441, 476-477, cert. denied, 295 U.S. 765 (1935). Though the better approach is for the prosecutor to refrain from any reference to the exercise of peremptory rights in a case such as this one, we believe that the reference made by the prosecutor here was cured by clear instructions to the jury by the trial judge on this matter.

8. The witness Margulis, an employee of the pawnshop, was allowed after extensive voir dire questioning by both sides, to identify the defendant as the one who shot the police officer. The witness's in-court identification of the defendant was bolstered by testimony that the witness spontaneously identified the defendant as the murderer some eight months after the crime, when the witness observed the defendant at the pawnshop while a view of the scene was being conducted for the jury's benefit. The defendant claims that both the out-of-court and the in-court identifications should have been excluded by the trial judge, the former because it was the result of a procedure so unnecessarily suggestive and conducive to irreparable mistaken identification as to amount to a violation of due process, the latter because it was the product of the suggestive procedure. *Commonwealth* v. *Kazonis*, 356 Mass. 649, 651-653 (1970), and cases cited. See *Neil* v. *Biggers*, 409 U.S. 188, 198-199 (1972); *Foster* v. *California*, 394 U.S. 440, 442-443 (1969); *Stovall* v. *Denno*, 388 U.S. 293, 302 (1967).

[10] In closing, the prosecutor stated: "Ask yourself about this particular defendant. What do you think? Do you think he knew what he was doing when he stood up there and said, 'I am content with this juror? I am content with this juror? I am content with this juror?' Do you think he knew what he was doing then?"

The defendant points out that Margulis did not pick out a photograph of the defendant (or of anyone else, for that matter) shortly after the incident, that the witness did not accurately describe the police officer's assailant when interviewed by the police on the day of the incident, and that Margulis did not identify the defendant at a lineup on the evening of the incident.[11] He further emphasizes that the Commonwealth pressed the view at the pawnshop and the handcuffing of the defendant during all phases of the view, and that the witness's testimony, offered on voir dire, was replete with contradictions to a statement given to the police on the day of the crimes regarding his ability to identify the assailant.

As to the suggestiveness of the "confrontation" on the view, the trial judge found that Margulis recognized the defendant right away as the one who shot the police officer, and that this recognition came without questioning or suggestion from anyone. The due process right to a fair trial is violated when the totality of the circumstances surrounding an out-of-court confrontation shows that there is "'a very substantial likelihood of . . . misidentification.'" *Neil* v. *Biggers*, *supra* at 198, citing *Simmons* v. *United States*, 390 U.S. 377, 384 (1968). However, the concept of

[11] On voir dire the defendant brought to the judge's attention that Margulis had stated at the lineup that "I only saw the one guy who shot [the police officer] and they are not the ones who shot [him]."

misidentification in this context is tied in with the word "confrontation," which connotes "a calculated move by the police to bring about pre-trial observations of a suspect by an eyewitness." *Commonwealth* v. *D'Ambra*, 357 Mass. 260, 263 (1970). In the *D'Ambra* case we said that when an eyewitness accidentally confronts a suspect, and the police make no improper attempt to elicit an identification, the problem of illegality disappears. *Ibid.*

No evidence was brought out on examination of the witness Margulis that his observation of the defendant was prearranged in any way. The defendant accompanied the jury on the view at his own request. Thus, while it may be difficult to accept that an individual would make no identification of a suspect on the day of the crime, and would unhesitatingly do so on seeing that same suspect, handcuffed and surrounded by police officers, on a day eight months after the incident, the due process argument we consider here calls on us to weigh more than just the witness's credibility. Accepting the judge's findings on this issue as true, see *Commonwealth* v. *Murphy*, 362 Mass. 542, 547 (1972), we conclude that the trial judge was warranted in finding that Margulis spontaneously recognized the defendant at a chance encounter. See *Allen* v. *Moore*, 453 F.2d 970, 974 (1st Cir.), cert. denied, 406 U.S. 969 (1972).

What we have said regarding Margulis's out-of-court identification has direct bearing in this case on the correctness of the judge's ruling with respect to the in-court identification which followed within a matter of days after the out-of-court encounter.[12]

[12] The judge found that, all told, Margulis observed the murderer for several minutes, at one time face-to-face while the man held a gun to him and took a plastic case containing identification cards from him; at another time when, as close as one foot from him, the man struggled with and shot the police officer; and at still another time when the man returned to the body of the slain policeman and removed a gun and wallet. The judge accepted the witness's explanation that he did not identify any photographs and failed to identify the defendant at the lineup because of the effect of the incident on him, because his attention was minimal due to the trauma of the incident, and because the witness was scared and made but a cursory observation of the individuals in the lineup. It was ruled that the in-court identification was based solely and completely on the witness's observation of the defendant during the course of the robbery and murder.

Because we have upheld the judge's ruling that the pre-trial "confrontation" was not so suggestive as to violate due process, it is unnecessary for this court to enter into the special analysis (concerning "independent source") which is required in any case where it is shown that there was a prior illegal pre-trial identification procedure. We further express no comment as to the permissible applicability of an approach, different from the independent source rationale, to a confrontation and in-court identification which occurred after the decision in *Stovall* v. *Denno*, 388 U.S. 293 (1967). See *Commonwealth* v. *Botelho*, 369 Mass. 860, 870-875 (1976).

9. The witness Anastasio Kapfaskis, an employee of the pawnshop at the time of the incident, testified that he had been shown numerous photographs of possible suspects on three occasions on the day of the murder, had identified one photograph (the defendant's) as that of the man who shot the police officer, and had viewed eleven men in a lineup held on the evening of the murder and identified the seventh man from the left (the defendant) as the one who shot the police officer. Kapfaskis was further allowed, over the objection and exception of the defendant, to make an in-court identification of the defendant as the murderer.

The defendant contends that this witness's testimony concerning his pre-trial identification of the defendant at the lineup should have been excluded because it was the product of an illegal arrest and was based on an invalid lineup which violated the defendant's right to due process of law. It is further alleged that the in-court identification proffered by the witness Kapfaskis should have been excluded because the trial judge made no finding regarding an independent basis for this identification or, in the alternative, the identification was tainted by the "illegal" lineup and should for this reason have been excluded.

In support of his argument regarding the witness's pre-trial identification, counsel for the defense brought out on voir dire of this witness that his identification at the lineup was equivocal, and that the officer conducting the lineup unsuccessfully pressed the witness for a more definite state-

ment.[13] As to the in-court identification, the defendant cites as controlling the case of *Commonwealth* v. *Mendes*, 361 Mass. 507, 511 (1972), where we said that, in a case where there was an illegal pre-trial identification necessitating a new trial, the issue of independent basis for an in-court identification should be considered and resolved by the trial judge in explicit findings.

We find no merit in either of these allegations of error. The trial judge made specific findings, supported by the witness's testimony at trial and on voir dire, that there was nothing impermissibly suggestive about the photograph identifications or the lineup, at which the defendant was represented by counsel. The judge's findings amply support his conclusion. Rather than suggesting that any particular suspect in the lineup was indeed the one who shot the police officer, the officer conducting the lineup was pointing out that the witness should (in fairness, perhaps, to one who was not involved in the pawnshop incident) tell the police *if* he had seen any of the suspects before. We cannot, in all the circumstances, consider the officer's prodding an intimation that the police believed that one of the lineup participants was the assailant, or that Kapfaskis was identifying "the wrong man." The judge's failure to make explicit findings relating to the issue of independent basis is not error in this case, in light of his specific and well based finding that there was no suggestiveness in

[13] The following colloquy took place at the lineup, in the defendant's presence, after Kapfaskis had said that the one who shot the policeman was either number seven (the defendant) *or* number eleven from the left:

THE POLICE OFFICER: "Have you ever seen any of them before?"

THE WITNESS: "Yes."

THE POLICE OFFICER: "Which one?"

THE WITNESS: "Do I have to?"

THE POLICE OFFICER: "I feel it is your duty if you have seen them to tell us. We are no better than the witnesses we have. Like I said, which one?"

The witness continued to equivocate, maintaining that it was either number seven or number eleven from the left.

the photograph identifications or the lineup.[14] Conflicts in Kapfaskis's testimony before the grand jury regarding the assailant's footwear, as well as the full transaction of events at the lineup, were brought to the jury's attention and were correctly treated as matters going to the weight of the witness's identification as opposed to its admissibility.

10. At trial, the Commonwealth presented Anthony Irving as its own witness. On direct examination, Irving testified to a meeting prior to the robbery at which he asked the defendant "if he wanted to make any money." Irving then stated that "we decided [to] make some money, and we had a stolen car, but we didn't want to take the stolen car." After the prosecutor queried the witness as to who was meant by his reference to "we," the defendant objected; the judge permitted the witness to answer, "Me and [the defendant]," and the defendant excepted to the admission of this testimony. The defendant now contends that, since it is common knowledge that stealing or receiving a stolen automobile is a crime, this testimony was prejudicial, and that the trial judge's statements before the jury in ruling on his objection[15] compounded the prejudice.

It is generally not permissible to show that a criminal defendant committed an unrelated crime on a prior occasion if the purpose of this showing is to raise an inference of guilt on the charge faced by the defendant at trial. *Commonwealth* v. *Welcome*, 348 Mass. 68, 70-71 (1964).

[14] See note 12 *supra*. In any event, we think that, if detailed findings by the judge had been called for here, the evidence fully would have warranted a finding of independent basis for the in-court identification since the witness testified that he observed the assailant for "a good minute" before and during the shooting, and gave a good description of the clothing worn by the man he observed and the events which transpired after the shooting. See *United States* v. *Wade*, 388 U.S. 218, 241 (1967).

[15] In making his ruling the judge said: "Well, I don't know whether Walker had anything to do with this. You have to explore this. I think I will have to permit an explanation. He said, 'We had a stolen car.' Go ahead. What do you mean by 'we?' He said, 'we.'" After the witness's response the judge said: "I will let it stand for whatever it is worth."

Commonwealth v. *Banuchi*, 335 Mass. 649, 654 (1957), and cases cited. Nevertheless, this rule is not applicable in all situations where the question arises; rather, there may be other relevant and probative purposes on which to base admission of the testimony of unrelated crimes. We have stated the test to be applied in these instances in this way: "If . . . the value of the statement as legitimate proof appeared to be substantially outweighed by the danger of prejudice not correctable by the good sense of the jury, a case could be made for excluding it . . . ." *Commonwealth* v. *Chalifoux*, 362 Mass. 811, 816 (1973).

It is not apparent from the record that the Commonwealth elicited this specific reference to a stolen car for any invalid purpose. Further, any prejudice to the defendant engendered by admission of this testimony was substantially outweighed by the probative value of the statement on the issue of criminal intent, see *Commonwealth* v. *Butynski*, 339 Mass. 151, 152 (1959), and the judge's instructions to the jury on the subject.

11. Detective McConkey testified before the jury that following the incident he had shown Lawrence Bean, a witness to the robbery and murder, a group of photographs, and that Bean had selected three or four photographs, one being a photograph of the defendant. The defendant contends that this testimony was inadmissible hearsay and severely prejudicial because it violated his right to confront the witnesses against him as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution. *Bruton* v. *United States*, 391 U.S. 123, 126 (1968). *Pointer* v. *Texas*, 380 U.S. 400, 406 (1965).

We do not agree that the admission of this testimony required the allowance of the defendant's motion for a mistrial. The testimony was struck from the record by the judge and a definitive cautionary instruction was given to the jury at the first opportunity, followed by a questioning of the jurors regarding any influence or prejudice the statement may have created in their minds against the defendant. The witness Bean had previously taken the stand and had testified that he selected five or six photographs as "resembling" the men in the store on the day in question, but he also testified before the jury that he did not positively identify anyone at the lineup, and the clear implication of his total testimony was that he did not get a good look at the person who shot the police officer. Though the defendant argues persuasively that *Bruton* v. *United States*, *supra*, and *Jackson* v. *Denno*, 378 U.S. 368 (1964), authoritatively established that curative instructions, in certain circumstances, are insufficient to remedy the prejudice resulting from inadmissible but dramatic evidence which reaches the jurors' ears, we do not consider those decisions apposite in the circumstances of this case. We hold to our expressed belief that "it cannot be assumed that jurors will ignore strong instructions to disregard certain matters." *Commonwealth* v. *Stone*, 366 Mass. 506, 513 (1974), citing *Commonwealth* v. *Gordon*, 356 Mass. 598, 604 (1970).

12. The Commonwealth was permitted to read in evidence a portion of the transcript of Ms. Freeman's pretrial testimony after the defendant had purportedly impeached Ms. Freeman at trial through use of another portion of the same transcript of testimony. The defendant claims that his use of the pre-trial testimony was to show a prior inconsistent statement by Ms. Freeman relating to whether she had seen a gun or guns before the police found two guns in one of the bedrooms, and that the Commonwealth could not corroborate Ms. Freeman's trial statement or use the pre-trial testimony to show a prior consistent statement that the witness made. See *Commonwealth* v. *Heffernan*, 350 Mass. 48, 52 (1966); *Boutillette* v. *Robbins*, 338 Mass. 195, 197-198 (1958); *Wilson* v. *Jeffrey*, 328 Mass. 192, 194 (1951).

The defendant's statement of the rule of evidence regarding prior consistent statements, in the abstract, is correct. However, we find no error in the trial judge's ruling allowing the Commonwealth to read the disputed portion of the transcript since it is plain that this ruling was predicated on a desire to keep the witness's entire testimony in context. From a reading of the entire testimony of this

witness it is readily seen that the specified few responses in her pre-trial testimony, to which the defendant referred, were not inconsistent with her trial testimony that she saw the defendant with a gun before the police entered her apartment. All that the defense succeeded in bringing out at the pre-trial hearing was that Ms. Freeman had not actually seen any guns in the bedroom where they were eventually discovered by the police.

13. Nathaniel Williams, an accomplice of the defendant in the robbery, refused to answer questions (other than preliminary questions) at the pre-trial hearing on the motion to suppress, claiming his privilege under the Fifth Amendment to the United States Constitution. He testified at trial, however, giving a thorough description of the events of November 30, 1973, and inculpating the defendant as to the robbery and the murder. On cross-examination, certain questions propounded by the defendant bearing on Williams's motivation for testifying were excluded by the judge, and it was further ruled that the defendant could not pursue before the jury a line of questioning going to whether Williams had refused to testify at the pre-trial hearing.

The issues raised by the allegation that these evidentiary rulings were in error are whether the judge unduly limited the defendant's rights to cross-examine and confront the witnesses against him, and whether the judge erred in denying the defendant his right to impeach by showing bias or motivation for Williams's testimony.[16]

[16] A related assignment of error concerns the trial judge's exclusion of a question put to Ms. Freeman which sought to show that she might be motivated to shift blame for the murder because her fiancé, Arnold Walker, was under indictment as an accessory after the fact to murder stemming from the pawnshop incident. Notwithstanding the fact that this question was not answered, the defendant brought out quite clearly the relationship between Ms. Freeman and Arnold Walker, and further showed that Ms. Freeman had no particular affection for the defendant. We cannot say that the trial judge abused his broad discretion to make proper rulings on the scope of cross-examination in this instance. See, e.g., *Commonwealth* v. *Heffernan*, 350 Mass. 48, 50, and cases cited, cert. denied, 384 U.S. 960 (1966).

Without derogating from the importance to a fair trial of the right of cross-examination, see *Commonwealth* v. *Ahearn*, *ante*, 283, 286-287 (1976); *Commonwealth* v. *Ferrara*, 368 Mass. 182, 186-190 (1975); *Davis* v. *Alaska*, 415 U.S. 308, 315-318, 320 (1974); *Chambers* v. *Mississippi*, 410 U.S. 284, 294-295 (1973), the courts of this Commonwealth have recognized that this right is not necessarily infringed by curbing inquiry where the matters sought to be elicited have been sufficiently brought to the attention of the trier of fact through other questioning or other means. See *Commonwealth* v. *Carroll*, 360 Mass. 580, 589 (1971); *Commonwealth* v. *Dominico*, 1 Mass. App. Ct. 693, 712-714 (1974). In the instant case there was ample evidence, including the recounting of a stipulation between the prosecutor and Williams's attorney that if Williams testified the court would be asked to accept a plea of guilty of murder in the second degree, which the jury could weigh against the witness's assertion on the stand that he was motivated only to tell the truth. As for the defendant's contention that he was severely prejudiced by not being permitted to bring out that Williams had refused to testify earlier, we think the trial judge was well advised to rule as he did in this case, and there was no abuse of discretion in this ruling. See *Commonwealth* v. *Heffernan*, 350 Mass. 48, 50, and cases cited, cert. denied, 384 U.S. 960 (1966).

14. The defendant requested that the following question be directed to prospective jurors: "This case will involve testimony by both police officers and private citizens, and such testimony may be in conflict. Will you tend to give greater weight or belief to the testimony of a police officer, simply because he is a police officer?" Although the Commonwealth had no objection to allowing this question, it was within the sound discretion of the judge to deny the request. *Commonwealth* v. *Pinckney*, 365 Mass. 70, 73 (1974). *Commonwealth* v. *Stewart*, 359 Mass. 671, 677 (1971) (no abuse of discretion in refusing similar questions even though defendant on trial for killing a policeman). The defendant's argument that refusal to put this question to prospective jurors abridged his right to a fair

and impartial jury by preventing effective voir dire examination is groundless. G. L. c. 234, § 28, as amended by St. 1973, c. 919.[17] *Commonwealth* v. *Pinckney*, *supra*, and cases cited. The same can be said for the defendant's further argument that the judge erroneously refused to allow defense counsel personally to ask voir dire questions of the prospective jurors. See *Commonwealth* v. *Nassar*, 354 Mass. 249, 253 (1968), cert. denied, 393 U.S. 1039 (1969); *Commonwealth* v. *Kiernan*, 348 Mass. 29, 35-36 (1964); *Commonwealth* v. *Geagan*, 339 Mass. 487, 504, cert. denied, 361 U.S. 895 (1959), petition for habeas corpus denied sub nom. *Geagan* v. *Gavin*, 181 F.Supp. 466, 474 (D. Mass. 1960), aff'd, 292 F.2d 244, 248 (1st Cir. 1961), cert. denied, 370 U.S. 903 (1962).

15. The defendant moved before trial that he be allowed to sit at the counsel table rather than in the prisoner's dock, as is customary in Massachusetts in criminal trials, absent unusual circumstances. We have in other cases considered the same basic arguments as those presented on these appeals, i.e., that use of the dock deprives an accused of his presumption of innocence before the jury and his right to consult freely with counsel during the trial, and prejudices him with respect to in-court identification by witnesses. In those cases we have said that "it is within the sound discretion of the trial judge whether to grant a defendant's request to sit at counsel's table or elsewhere." *Commonwealth* v. *Bumpus*, 362 Mass. 672, 680 (1972), citing *Commonwealth* v. *Jones*, 362 Mass. 497, 500-501 (1972).[18] In the present case the judge assured counsel for

[17] The trial of this case took place before G. L. c. 234, § 28, was amended by St. 1975, c. 335, which, "if it appears that, as a result of the impact of considerations which may cause a decision ... to be made in whole or in part upon issues extraneous to the case," makes mandatory inquiry into matters such as "possible preconceived opinions toward the credibility of certain classes of persons."

[18] Since the *Bumpus* decision, in *Commonwealth* v. *Brown*, 364 Mass. 471, 479-480 (1973), we established certain minimal guidelines which we suggested a trial judge follow when he contemplates using excessive or special security precautions at a trial. The *Brown* requirements were geared to deal with special restraints or precautions, such as shackling,

the defendant that he would have all the time he needed to confer with his client during the trial. Despite the fact that two identifying witnesses made reference to the man in the dock as the one who shot the police officer, other crucial identification testimony came from accomplices to the crime who, presumably, would have been able to identify the defendant regardless of where he was seated in the court room. We do not think that the judge abused his discretion by arbitrary or unreasonable action, considering the crimes charged and the defendant's reputation.

16. The defendant cites as erroneous the judge's instruction to the jury that the Commonwealth, unlike the defendant, cannot appeal the jury's decision. Claiming that there was no necessity for injecting into the proceedings the "extraneous and prejudicial" issue of appeal rights, the defendant cites decisions from other jurisdictions in which reference to the appeals process was held to be reversible error. See *United States* v. *Fiorito*, 300 F.2d 424, 426-427 (7th Cir. 1962). *State* v. *Mount*, 30 N.J. 195, 212-215 (1959). Cf. *People* v. *Johnson*, 284 N.Y. 182, 187-188 (1940) (prosecutor's questions to prospective jurors). An examination of the cited decisions uncovers the rationale behind such holdings: It is reversible error for the judge or prosecutor to make remarks which have the inescapable effect of reducing the jurors' appreciation of the significance of their deliberations and verdict. Such remarks implicitly tell the jurors not to be overly concerned about rendering hasty or "correct" verdicts, since the defendant is adequately protected by the process of appeal to higher tribunals.

The defendant has indeed touched on a subject which, if it is to be mentioned to the jury at all, must be handled with the greatest of care and discretion by a judge in framing his jury instructions. We can conceive of trials in which the better practice might be to refrain from mentioning

handcuffing or gagging a defendant, and were not intended to deal with less drastic means of minimizing the danger of harm to the public and maintaining order in the court room, such as use of the prisoner's dock.

anything about the Commonwealth's part in the appellate process. Where it appears to the trial judge that the defendant could not have been placed in an unfavorable light through the routine practice of his counsel in objecting and excepting, again it may be preferable to forgo comment. In our time it is probable that jurors are aware of appeals in criminal cases, and unless the trial judge has some reasonable belief that procedures employed during the trial may have unduly confused the jury or unduly prejudiced one side or the other — with an especially keen eye to any possible unfairness to the defendant — it is better to allow their awareness to play what small part it will, if any, in the decision they reach.

Having said this, we find no error in the instruction before us.[19] Taken as a whole, this portion of the judge's

[19] The pertinent part of the challenged instruction is as follows: "Now, during the course of the trial you probably observed undoubtedly that certain objections were taken by the defendant through his attorney. Well, the law in that regard is that the defendant, if he fails to save an exception or take an exception to a judge's ruling, has nothing as a basis for a review in a higher tribunal, so in order to protect the rights of the defendant, it is incumbent upon his attorney to take an exception to any ruling that the Court might make in order to perfect or open the door for an appeal, if one indeed is taken, and it is only for the purpose of later determining of the legality of the rulings made by the judge if exceptions are taken and if an appeal is taken. This is the right of the defendant, defendant's counsel. This is the reason why exceptions were taken by the defendant doing his job for his client, or by the defendant's counsel doing his job for his client.

"Now, on the other hand, you probably noted that certain objections were made by the Assistant District Attorney but that no exceptions were taken by the Assistant District Attorney. Well, under our procedure and the state of our law a District Attorney or Assistant District Attorney may make objections and call matters to the attention of the Court and have discussions with the Court at the other end of the bench, as you saw we did on many occasions, but the Commonwealth has no right to an appeal except in certain preliminary matters with which you are not now concerned. So, if the judge overrules an objection of the Commonwealth so far as the Commonwealth is concerned, the Assistant District Attorney again may call a particular ruling of law to the Court for correction, suggest correction to the Court, but he cannot take a legal exception. I wanted to point out to you why you might have seen exceptions on the part of the defense counsel, no exceptions on the part of the Assistant District Attorney trying the case for the Commonwealth."

instruction was plainly designed to protect the defendant from prejudice by explaining his counsel's unquestionably proper actions in preserving his client's rights.

17. The witness Susan Reyno was not permitted to make an in-court identification of the defendant because the judge, after voir dire, found that the prosecutor or someone designated by him had shown her a suggestive photographic display just prior to her testimony at the trial. She had seen numerous photographs of possible suspects shortly after the incident and had viewed the lineup held that evening but had not positively identified the defendant on either occasion. However, the Commonwealth did elicit from the witness that she saw and could identify the two men who did not shoot the police officer, and that these two men were not in the court room. The defendant assigns the denial of his motion for a mistrial as error, alleging that the judge permitted the jury, through this procedure, to infer that the witness had made an identification of the defendant. It is further said that the defendant was placed in a quandary through this procedure since he could not cross-examine Mrs. Reyno to show her inability to identify the defendant without exposing the jury to her prior illegal identification.

The judge's ruling, which precluded the in-court identification of the defendant by this witness, did not extend to any testimony she offered regarding the other two men she observed in the store on the day of the crimes. While the record is somewhat muddled on this precise point, it appears that the witness had testified previously that she could identify two "fellows" who, from their locations in the pawnshop at the moment of the shooting, could not have killed the police officer. This testimony was received before the jury without objection. There was no motion to strike this testimony at any point during the witness's examination. The effect of Mrs. Reyno's later testimony was cumulative at worst, see generally *Commonwealth* v. *Kirker*, 362 Mass. 202, 203-205 (1972), and its admission does not supply grounds for a mistrial.

The defendant's dilemma, referred to *supra*, was more imagined than real. The record shows that the defendant on cross-examination successfully procured an admission from the witness that she had lied to the defendant's investigator about the number of persons involved in the robbery whom she could identify, and the jury were read the lineup transcript where, confronted with the defendant, Mrs. Reyno could not identify him and said, "No, he was taller, I think." The judge excluded further questions by the prosecutor on redirect examination which would have emphasized that Mrs. Reyno had said, prior to or during the voir dire, that she could identify all three men who were in the store. The judge also refused to allow the prosecutor to use before the jury any photographs of the two other men on the basis that they were not supplied to the defendant pursuant to a court order. There was no substantial prejudice to the defendant in these circumstances.

18. The defendant produced at trial two lay and two expert witnesses who testified, inter alia, to the defendant's bizarre behavior since early childhood, attempts to place the defendant in McLean Hospital in early 1972, and the defendant's insanity within the meaning of *Commonwealth* v. *McHoul*, 352 Mass. 544, 546-547, 555 (1967). The Commonwealth produced no expert witnesses to rebut this testimony. More will be said of the specifics of the expert testimony *infra;* for now it is sufficient to note that this evidence properly raised an issue for the jury to resolve.[20]

[20] The defendant does not assert that, as matter of law, he should have been granted directed verdicts of not guilty by reason of insanity. This undoubtedly stems from our ruling in *Commonwealth* v. *Smith*, 357 Mass. 168, 177-180 (1970), where we said that it was not error to deny a motion for a directed verdict in the context of a case in which the Commonwealth presented no evidence that the defendant was sane and the defendant presented two experts who concluded that the defendant was insane at the time of the commission of the offense. See *Commonwealth* v. *Kostka, ante,* 516, 535-536 (1976); *Commonwealth* v. *Ricard,* 355 Mass. 509, 515 (1969); *Commonwealth* v. *Hartford,* 346 Mass. 482, 489 (1963); *Commonwealth* v. *Cox,* 327 Mass. 609, 613 (1951). In the *Smith* case we emphasized that the question of criminal responsibility "is one of the issues of fact which in a capital

The defendant argues that there was error in this case in the judge's instruction to the jury on sanity. The defendant would have this court (1) reverse his convictions on all the indictments because the judge's instruction reversed the burden of proof[21] and in effect allowed the Commonwealth to prove its case by presenting no evidence whatsoever on the issue of sanity, or (2) set aside the verdicts of guilty on all the indictments as against the weight of the evidence since the defendant presented lay and expert testimony as to his legal mental incapacity to commit the crimes charged and the Commonwealth presented no affirmative evidence of sanity, relying instead on the "presumption of sanity."[22]

The trial judge instructed the jury that, "[g]enerally, when a person is charged with a criminal offense and there is no evidence introduced concerning his mental condition, under such circumstances it is to be presumed that the person charged with the crime was of sufficient mental capacity to commit it. We assume under those circumstances, as I just recently indicated, that the man has the mental capacity to commit a crime. The law states that in such cases there is a presumption that a person is sane." He continued to instruct that the jury must "consider and look at the whole evidence regarding the mental condition of the defendant in making [the] determination [of sanity or

case must 'be tried by a jury,' " and we were emphatic in holding that the power of the jury as sole judges of the credibility and weight of all the evidence of sanity could not be usurped by expert opinion testimony. *Commonwealth* v. *Smith, supra* at 178, 180.

[21] The burden of proof is a composite burden usually requiring the party on whom it rests to "go forward" with the evidence (the "burden of production") and to convince the trier of fact by some quantum of evidence (the "burden of persuasion"). The defendant concedes that, even in a criminal case, where insanity is a defense the defendant shoulders the "burden of production," and therefore no challenge to the judge's instruction in this case is premised on a shifting of this burden. The defendant's challenge to the instruction is concerned only with the manner in which, from his viewpoint, it shifted to him the "burden of persuasion."

[22] See *Commonwealth* v. *Kostka, supra* at 525 n.5, wherein we explained the necessity of using the term "presumption," and indicated that we do not suggest that the term be used in instructing the jury.

insanity]," and that "[t]he burden is upon the Commonwealth to prove that the defendant was legally sane beyond a reasonable doubt[23] ... as I have already defined for you the meaning of proof beyond a reasonable doubt."

The judge then pointed out to the jury that "we have had some opinion testimony given by psychiatrists, psychologist, and we have heard other evidence as to the mental capacity of the defendant for his acts or conduct." After explaining that those who have "given special attention and study to the field of mental infirmities and weaknesses [are] allowed to give [their] opinion as to the mental capacity of a defendant to commit a crime," the judge charged that because experts are allowed to express their opinions, "it doesn't follow that [they] are to usurp the function or to stand in the place of the jury." Experts' opinions, the judge noted, are "evidence for your consideration," and "subject to the weight that the jury feels should be given to it."

The judge then told the jury that "[i]n assessing a defendant's mental responsibility for crime, the jury should weigh the fact that a great majority of men are sane and the probability that any particular man is sane." The assessment of mental responsibility for crime, the judge said, "is to be made in each case in the light of the evidence introduced, the circumstances that [the jury] have heard." As "sole judges of the credibility and weight of all evidence on the issue of insanity," the jury "may believe, but is not compelled to believe, any ... testimony or opinion given by an expert."

[23] The defendant flags as confusing and incorrect the judge's reference at one point in his charge to the Commonwealth's burden of proving the defendant "*reasonably* sane beyond a reasonable doubt." Beyond question, this was an unfortunate slip of the tongue. However, coming as it did — sandwiched between repeated references to the correct standard of "legally sane beyond a reasonable doubt" — we will not engage in a "fine-spun parsing of the ... judge's charge to the jury [so as to turn] the appellate review of this case into [a] 'quest for error' ...." *Cool* v. *United States*, 409 U.S. 100, 105 (1972) (Rehnquist, J., joined by Burger, C.J., and Blackmun, J., dissenting). See *Cupp* v. *Naughten*, 414 U.S. 141, 146-147 (1973).

The judge then reiterated that "it has been stated in our judicial decisions that it is for the jury to determine whether or not the fact that a great majority of men are sane and the probability that any particular man is sane may be deemed to outweigh the evidential value of any expert testimony that [a person] is insane." In concluding this portion of his charge, the judge stated that "[i]t is for the jury to determine again on all the evidence and all of the circumstances whether the defendant did or did not lack mental capacity to commit a crime."

We find no reversible error in this charge to the jury. Contrary to the defendant's assertion, the judge did not instruct the jury that they could weigh the "presumption of sanity" as an element of the whole evidence and then determine that the "presumption" outweighed the evidence of lay and expert witnesses that the defendant was insane at the time of the crimes. The judge's reference to the fact that in the mine run of cases (where no evidence is presented by either side on the issue of sanity) a person is "presumed" sane, though we do not see its relevance in this case, was merely introductory. This language set the stage for the judge's more pertinent instructions as to the law in cases where the defendant does produce evidence of insanity. In the latter, more crucial portion of his charge the judge instructed, not as to any "presumption of sanity," but only as to the jury's prerogative of considering the "fact that a great majority of men are sane and the probability that any particular man is sane."[24]

In so instructing the jury, the judge correctly distinguished between the procedural and substantive operations of the "presumption of sanity" which we recently analyzed in *Commonwealth* v. *Kostka*, *supra* at 530-531. The substantive operation of the "presumption," we said in *Kostka*, does not require or allow the jury to weigh the "presumption" itself as evidence; "rather, the jury weigh

[24] See *Commonwealth* v. *Kostka*, *supra* at 525 n.5 (1976) wherein we described the appropriate charge to be given as to this aspect of the proof of sanity.

the facts underlying the presumption and the inferences that may follow from those facts . . . which are considered to be part of the jury's 'common experience that most people . . . are sane' " (citations omitted). *Commonwealth* v. *Kostka*, *supra* at 530-531.

Nor are we compelled to conclude that the judge's instruction here permitted the jury to find the defendant sane beyond a reasonable doubt based solely on their common experience that most men are sane. As we have recognized in several decisions (see note 20 *supra*), most notably *Commonwealth* v. *Smith*, 357 Mass. at 180-181, whether or not a defendant testifies or makes an unsworn statement, there is invariably other evidence which a jury are permitted to weigh in reaching their conclusion on the sanity issue. See *Commonwealth* v. *Ricard*, 355 Mass. at 515 (evidence of provocation and of defendant's conduct before and after the crime); *Commonwealth* v. *Hartford*, 346 Mass. at 489-490 (testimony of witnesses as to defendant's conduct around the time of the crime); *Commonwealth* v. *Cox*, 327 Mass. at 613 (evidence of murder committed with deliberately premeditated malice aforethought). In the instant case there was accomplice testimony relating to the defendant's conduct before the crimes, eyewitness testimony relating to the defendant's conduct at the time of the murder, and testimony from others who were able to observe the defendant a short time after the crimes had been committed. In addition, the circumstances of the murder in this case could not have made it "plainly apparent" that no sane person would have committed the act. *Commonwealth* v. *Smith*, *supra* at 180. See *Commonwealth* v. *Francis*, 355 Mass. 108, 111 (1969); *id.* at 112 (Whittemore and Cutter, JJ., dissenting). The charge to the jury clearly and correctly pointed out that their duty was to consider *all* the evidence in reaching their decision on the defendant's mental responsibility.

Finally, we are not persuaded that the judge's instruction impermissibly shifted the burden of proof to the defendant. The instruction was emphatic as to the Commonwealth's burden of proving sanity beyond a reasonable doubt;[25] it left no room for the jury to maneuver in determining whether that burden had been met on all the evidence. As we said in *Commonwealth* v. *Kostka*, *supra* at 533, since sanity is not an element of the crimes charged, "recent Supreme Court cases on the use of presumptions and inferences to establish an element of the offense . . . [and thus shift the burden of proof as to those elements to the defendant, are not] apposite to our inquiry."[26]

19. *Disposition under G. L. c. 278, § 33E.*

With particular reference to the defendant's urging that we set aside the verdicts of guilty as against the weight of the evidence because the Commonwealth presented no expert testimony that the defendant was sane at the time of the crimes, our observations in the *Kostka* case are pertinent. As we said there, "We believe that the instant case can be distinguished readily from the cases in which we have determined that the defendant's evidence of insanity was so compelling that reversal under § 33E was appropriate." *Commonwealth* v. *Kostka*, *supra* at 537-538.

We have alluded to the testimony in this case bearing on the circumstances of the crimes which the jury could properly consider as relevant to the dual tests of sanity as set forth in *Commonwealth* v. *McHoul*, 352 Mass, 544, 546 (1967). There was testimony from one of the defendant's accomplices that he and the defendant planned the pawnshop robbery "to make some money," and that they enlisted as the driver of the getaway car a third person who had a car bearing out-of-State license plates; the witnesses to the murder testified that the defendant shot the police-

[25] In this regard the instruction was in conformity with the standard long enunciated by this court in the many cases cited and discussed in *Commonwealth* v. *Kostka*, *supra*.

[26] In this quote from *Kostka* we cited *Barnes* v. *United States*, 412 U.S. 837 (1973), and *Turner* v. *United States*, 396 U.S. 398 (1970), cases relied on by the defendant in the present case as supportive of his claim that the instruction impermissibly shifted the burden of proof to him.

man during a struggle, and then returned to the slain officer's body to remove his wallet and service revolver; Ms. Freeman and Anthony Dobson, who were present in the Freeman apartment after the robbery and murder, testified as to the events surrounding the "splitting up" of the robbery proceeds; Ms. Freeman testified as to the defendant's reaction on learning that the police had surrounded her apartment; and, finally, two of the police officers present at the Freeman apartment testified that the defendant denied that he was Terrell Walker when asked his identity. From this testimony a basis could be found to differentiate between the instant case and cases like *Commonwealth* v. *Mutina*, 366 Mass. 810 (1975), and *Commonwealth* v. *Cox*, 327 Mass. 609 (1951), where, as we pointed out in *Kostka*, *supra* at 538, "there was neither an intelligent plan nor a rational motive for the murder."

Furthermore, though this case differs even from *Kostka* in that two qualified experts (as compared to one such expert in the *Kostka* case) expressed the opinion that the defendant was insane at the time of the crimes, we cannot say that the jury would not have been justified in according little weight to both of the experts' opinions. In particular, the opinion of the first of the two experts (Dr. Gatti) was susceptible to receiving slight value since he had seen the defendant only once for approximately an hour and a half some one and one-half years before the pawnshop incident and, admittedly, he had no knowledge of anything that might have happened to the defendant in the interval between his interview with the defendant and the commission of the offenses.

We have examined the entire record and given careful consideration to all the defendant's assertions in view of our duty under G. L. c. 278, § 33E, and a majority of the court are of the opinion that justice does not require reversal, a new trial, or the entry of a verdict of a lesser degree of guilt.

Judgments affirmed.

HENNESSEY, C.J. (dissenting in part, with whom Kaplan, J., joins). As in the recent case of *Commonwealth* v. *Kostka*, *ante*, 516 (1976), I am impelled to utilize the unusual procedure of writing the main opinion for the court and including in this separate opinion my dissent from the court's reasoning in declining to set aside the verdict in this case under § 33E.

Once again we are faced on appeal with a case in which there was uncontradicted expert testimony that the defendant — who had a long history of mental disease antedating the crime — was insane at the time he committed the offenses with which he was charged. In my opinion, not only is the fact that the Commonwealth has chosen not to produce affirmative evidence of sanity "inexplicable" (see *People* v. *Silver*, 33 N.Y.2d 475, 483 [1974]), but it results, in this case, in injustice of the kind this court may prevent by exercising our discretion under § 33E.

In the majority's refusal to act under § 33E here, I discern a trend toward treating the Commonwealth's burden on the sanity issue in cases like *Commonwealth* v. *Mutina*, 366 Mass. 810 (1975), and *Commonwealth* v. *Cox*, 327 Mass. 609 (1951), differently from its burden in cases such as this one and *Commonwealth* v. *Kostka*, *supra*. There may be some validity to this trend; but the problem remains as to just what role the "presumption of sanity" should play in these cases. I suggest that a more uniform approach by this court would place the Commonwealth on notice that the failure to introduce medical evidence of sanity, in the face of credible evidence tending to establish insanity, means that the Commonwealth "runs the very real risk of reversal and the granting of a new trial" under the provisions of § 33E. *Commonwealth* v. *Kostka*, *supra* at 539-540, (Hennessey, C.J., and Kaplan, J., dissenting in part).

LIACOS, J. (concurring). I am in general agreement with the majority's reasoning and agree with their result in this case. I share, however, the Chief Justice's concern about the proper role of the "presumption of sanity" after credible evidence of insanity has been adduced. I therefore

join in that part of his dissenting opinion which suggests that reversal and the granting of a new trial may be appropriate should the Commonwealth fail to produce affirmative evidence of sanity in a case such as this.

Appendix B.

UNITED STATES DISTRICT COURT

FOR THE

DISTRICT OF MASSACHUSETTS.

TERRELL WALKER,
PETITIONER,

v.

FREDERICK BUTTERWORTH ET AL.,
RESPONDENTS.

Civ. A. No. 77-973-C.

September 28, 1978.

Norman S. Zalkind and Stephen L. Saltonstall, Zalkind & Zalkind, and Eric D. Blumenson, Suffolk University Law School, Boston, Mass., for petitioner.

Robert S. Potters, Asst. Atty. Gen., Crim. Div., Boston, Mass., for respondents.

Opinion

CAFFREY, Chief Judge.

This is a § 2254 petition for a writ of habeas corpus brought by a state prisoner, Terrell Walker, against Fred Butterworth, Superintendent of Massachusetts Correctional Institution, Walpole, Massachusetts. Petitioner is presently serving a sen-

tence of life imprisonment imposed by the Superior Court of Suffolk County after his conviction on one count of first-degree murder of John D. Schroeder, a plain-clothed police officer, and four counts of armed robbery of Officer Schroeder, a loan company, and two customers. The defense offered was that petitioner was insane at the time he committed the charged offenses. The convictions were affirmed by the Supreme Judicial Court, and a petition for certiorari was subsequently denied. *Commonwealth v. Walker*, Mass. 350 N.E.2d 678, *cert. denied*, 429 U.S. 943, 97 S.Ct. 363, 50 L.Ed.2d 314 (1976). Petitioner has exhausted available state remedies.

Under 28 U.S.C.A. § 2254(a), federal habeas corpus review does not lie for every legal error, infirmity or undesirable practice occurring in a state trial, but rather is limited to those errors which violate a state prisoner's federal constitutional or statutory rights and which cannot be said to be harmless beyond a reasonable doubt. *E.g.*, *United States ex rel. Santiago v. Vincent*, 423 F.Supp. 103, 106 (S.D.N.Y. 1976), *aff'd*, 553 F.2d 94 (2d Cir. 1977); *see Cupp v. Naughten*, 414 U.S. 141, 146, 94 S.Ct. 396, 38 L.Ed.2d 368 (1973). Petitioner contends here that his jury trial in August, 1974 was constitutionally defective in four respects:

(1) The court's instruction that the Commonwealth cannot take an appeal but the defendant can violated petitioner's rights to due process of law and to a constitutionally fair trial by an impartial jury;

(2) the combination of the court's requirement that the petitioner personally exercise his peremptory jury challenges, and the prosecutor's argument that this exercise demonstrated sanity, violated petitioner's rights under the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution;

(3) the confinement of petitioner in the prisoner's dock eroded the presumption of innocence and deprived petitioner of his right to a constitutionally fair and impartial trial;

(4) the court's instructions, particularly on the "presumption of sanity," reduced the Commonwealth's burden of proof and deprived him of a constitutionally fair trial on the issue of his sanity, in violation of petitioner's right to due process of law.

Every claim raised in support of the petition was directly addressed and rejected by a majority of the Supreme Judicial Court. Indeed, disagreement was voiced by three of the Justices only with respect to the presumption-of-sanity issue. 350 N.E.2d at 702 (Hennessey, C.J., & Kaplan, J., dissenting in part), 350 N.E.2d at 702-03 (Liacos, J., concurring). On habeas review their reasons in support of a discretionary reversal under Mass.Gen.Laws Ann. ch. 278, § 33E (West Supp. 1977-78) do not require or support a finding of constitutional error. *See Cupp v. Naughten, supra*, 414 U.S. at 146, 94 S.Ct. 396.

After a hearing and a review of the voluminous record, I rule that petitioner's application for a writ of habeas corpus should be denied and the petition dismissed.

Rights of Appeal

At trial, the court, in the course of its instructions to the jury, offered an explanation of why defense counsel, but not the Assistant District Attorney, had taken exception to overruled objections. The court observed that the Commonwealth enjoyed no right of appeal from "particular ruling[s] of law" made at the trial. By inference, the court suggested that the defendant could pursue an appeal from such rulings and his counsel took exceptions to its overruled objections in order to preserve that right.

The Supreme Judicial Court rejected claim of error re the mention of appeal rights. In acknowledging the sensitivity of

this subject in the context of jury instructions, the court declared that the better practice, in most trials, would be to refrain from mentioning either the appellate process or the objection and exception procedure. 350 N.E.2d at 696-97. But viewing the lengthy charge as a whole, the court concluded that the challenged portion of the instruction "was plainly designed to protect the defendant from prejudice by explaining his counsel's unquestionably proper actions in preserving his client's rights." *Id.* 350 N.E.2d at 696-97. Therefore, it ruled that cases such as *United States v. Fiorito*, 300 F.2d 424, 426-27 (7th Cir. 1962), and *State v. Mount*, 30 N.J. 195, 212-15, 152 A.2d 343 (1959), were distinguishable because these remarks were not intended to dilute the jurors' appreciation for the significance, correctness, or permanence of their verdicts. *Id.* 350 N.E.2d at 696; *cf. People v. Johnson*, 284 N.Y. 182, 187-88, 30 N.E.2d 465, 467 (1940).

Petitioner now contends that the potential effect of the instruction on the jury, not the well-intentioned motive of the trial judge, should have been the focal point of the reviewing court. He argues that coming from the judge, the remark was prejudicial because it skewed the jury's sense of responsibility by allowing its members to believe that a mistaken decision against the Commonwealth was final, but that an error against the defendant could always be corrected.

The precise contours for federal habeas review of an erroneous state-court instruction have been forcefully articulated by the Supreme Court:

> Before a federal court may overturn a conviction resulting from a state trial in which this instruction was used, it must be established not merely that the instruction is undesirable, erroneous, or even "universally condemned," but that it violated some right which was guaranteed to the defendant by the Fourteenth Amendment.

> . . . [A] single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall change. *Boyd v. United States*, 271 U.S. 104, 107 [46 S.Ct. 442, 443, 70 L.Ed. 857] (1926). . . . [A] judgment of conviction is commonly the culmination of a trial which includes testimony of witnesses, argument of counsel, receipt of exhibits in evidence, and instruction of the jury by the judge. Thus not only is the challenged instruction but one of many such instructions, but the process of instruction itself is but one of several components of the trial which may result in the judgment of conviction.
>
> . . . [T]he question is not whether the trial court failed to isolate and cure a particular ailing instruction, but rather whether the ailing instruction by itself so infected the entire trial that the resulting conviction violated due process. *Cupp v. Naughten*, *supra*, 414 U.S. at 146-47, 94 S.Ct. at 400.

Neither *Fiorito* nor *Mount*, relied on by plaintiff, involved federal habeas review of a jury charge delivered at a state court proceeding. Indeed, both decisions relied upon the broad, nonconstitutional, supervisory-power grounds that *Cupp* rejected as alien to habeas analysis. 414 U.S. at 146, 94 S.Ct. 396, *see* 300 F.2d at 427, 152 A.2d at 352. Moreover, the jury instructions challenged in *Fiorito* flagrantly invited a juror to conclude that his factual determination was preliminary and thus unimportant. *See* 300 F.2d at 425-27. The instruction in the instant case, however, did no more than say that the judge's rulings of law were not final with respect to the defendant. *See United States v. Miceli*, 446 F.2d 256, 259-60 (1st Cir. 1971). It invited no abdication of the jury's exclusive province to find facts. Accordingly, *Fiorito* and *Mount* are distinguishable and do not control this case.

I concur with the Supreme Judicial Court that a fair reading of the challenged portion of the instruction suggests that it was gratuitously intended to benefit Walker, not to prejudice him. Speculation about the effect of a discrete portion of a 57-page charge, on the minds of lay jurors who sat through a two-week trial, is an uncertain task for a judge as well as for counsel. In its charge, the trial court made it clear to the jury; that the Commonwealth was obligated to prove the petitioner's guilt beyond a reasonable doubt; that their duty to pass upon the guilt or innocence of the defendant was a "grave," "solemn," and "heavy" one; that their verdict should be free of bias, prejudice or hostility; that speculation, guesswork, surmise or conjecture should play no part in their consideration; that they were the sole "judges . . . [and] final arbiters of the facts;" that their analysis of testimony should be fair, impartial, and dispassionate; and that they must accept and apply the law as instructed. Thus, even assuming that effect rather than intent is the proper inquiry, the trial judge's comment, in the context of the entire charge, plainly did not encourage, invite or suggest that the jury violate their oath and find the petitioner guilty because of the availability of appellate review on his behalf. Thus, applying the *Cupp* standard to this instruction, I conclude that the reference to the mechanics of appeal did not have the effect of prejudicially weakening the jurors' sense of their responsibility to find the facts and objectively determine guilt or innocence. *Cf. Dunn v. Perrin*, 570 F.2d 21, 25 (1st Cir. 1978), *cert. denied*, ____ U.S. ____, 98 S.Ct. 3102, 57 L.Ed.2d 1141 (1978). Accordingly, I rule that the charge did not deny petitioner his constitutional rights to due process of law and a fair trial by an impartial jury.

PRISONER'S DOCK

Petitioner's second contention is that he was unconstitutionally compelled to appear before the jury in the "prisoner's dock." Absent unusual circumstances, it is the customary practice in Massachusetts that defendants in criminal cases sit in a dock. *E.g.*, *Commonwealth v. Walker*, *supra*, 350 N.E.2d at 695. The dock is a box approximately four feet square and four feet high. It is open at the top so that the defendant's head and shoulders can be seen when he or she is seated. The dock is placed typically at the center of the bar enclosure which separates the spectators' section from that portion of the courtroom reserved for trial principals. The dock is usually fifteen to twenty feet behind counsel table, and is sometimes on a raised platform. Thus, the dock is generally closer to exits than counsel table.

At a pretrial hearing, the court offered the following reasons for placing petitioner in the dock and denying his motion to sit at counsel table:

> THE COURT: . . . You have got an attorney who is going to be sitting with you, and I will give you all the time you want to walk back and forth to your client to have any discussions that you want with him, but I would prefer not to have a defendant in a murder case sit at the counsel table.

Petitioner objected timely. On appeal, petitioner contended that forcing him to sit in the dock deprived him of his rights to a fair and impartial trial, the presumption of innocence, non-suggestive eye-witness identifications, due process of law, and unrestricted access to counsel. The Supreme Judicial Court, noting that these same arguments had been presented and re-

jected in other appeals, reaffirmed that "it is within the sound discretion of the trial judge whether to grant a defendant's request to sit at counsel's table or elsewhere." *Commonwealth v. Walker, supra,* 350 N.E.2d at 695-96, *citing Commonwealth v. Bumpus,* 362 Mass. 672, 680, 290 N.E.2d 167 (1972) (murder, armed robbery convictions), *citing Commonwealth v. Jones,* 362 Mass. 497, 500-01, 287 N.E.2d 599 (1972) (armed robbery, jury-waived trial). I am mindful of the crimes charged, the defendant's "reputation," the court's assurance of ample time to consult with counsel, and the "crucial" accomplice identification testimony that was "presumably" unaffected by petitioner's courtroom location. The Supreme Judicial Court held that the trial judge committed no arbitrary or unreasonable action demonstrating an abuse of discretion. 350 N.E.2d at 696.

Petitioner's position here against the use of the dock is now grounded upon the presumption of innocence and the due-process right to a fair trial. Conceding as "impossible" any effort to show actual prejudice to these rights petitioner contends, on the one hand, that no such showing is necessary, and on the other, speculates as to the range of prejudicial inferences a jury might deduce from observing this defendant confined in the dock. Petitioner also claims that discretionary use of the dock is per se constitutionally infirm because the practice is arbitrary and furthers no essential state policy.

In my judgment, the prisoner's dock is an anachronism in a modern criminal trial which could have been abandoned years ago. But it overstates the case to label the dock as "atavistic" or to characterize it as "closely analogous" to the unconstitutional practice of compelling defendants to stand trial before a jury while dressed in identifiable prison garb. *Estelle v. Williams,* 425 U.S. 501, 512, 96 S.Ct. 1691, 48 L.Ed.2d 126, *rehearing denied,* 426 U.S. 954, 96 S.Ct. 3182, 49 L.Ed.2d 1194 (1976).

Unlike the practice discussed in *Estelle v. Williams, supra,* at 505, 96 S.Ct. 1691, a discretionary requirement to have a defendant sit in a designated spot such as the dock can serve several essential state policies: (1) it identifies the accused person to the jury, *see Commonwealth v. Bumpus, supra,* 362 Mass. at 680, 287 N.E.2d 599; (2) it minimizes the danger of harm to the public, court, counsel, jurors, and witnesses, *Commonwealth v. Walker, supra,* 350 N.E.2d at 696 n.18; and (3) it encourages the maintenance of courtroom order and decorum without the use of such drastic measures as shackling, handcuffing, or gagging, *id.; see Commonwealth v. Boyd,* 246 Pa. 529, 534, 92 A. 705 (1914). While it is true that other procedures or better-trained personnel might achieve the same goals, that fact does not render use of the dock unconstitutional. As an instrument of physical segregation, the dock is no less distinctive or identifiable than the frequent practice of requiring a defendant to sit on one side of counsel table or at one end of the front public bench. Thus, I conclude that the custom of segregation in the dock is not unconstitutional *per se* because, as a general practice, it presents neither a "constant [implicit] reminder of the accused's condition . . . [so as to] affect a juror's judgment . . . [or] is so likely to be a continuing influence throughout the trial that . . . an unacceptable risk is presented of impermissible factors coming into play." *Estelle v. Williams, supra,* 425 U.S. at 504-05, 96 S.Ct. at 1693.

Petitioner's speculations concerning the impact of the dock on the jurors are, admittedly, unsupported in the record, and, in any event, are dispelled by his own mockery of the dock as an ineffective security device to corral the dangerous. For these reasons, as well as those stated by the Supreme Judicial Court, *Commonwealth v. Walker, supra,* 350 N.E.2d at 696, I rule that petitioner's discretionary segregation in the dock neither diluted his presumption of innocence nor denied him a fair and impartial trial. Alternatively, if placement in the

dock could be viewed as having the probability of encouraging the jury to view the petitioner as violent, dangerous, and factually guilty of the crimes charged, see *Estelle v. Williams, supra*, 425 U.S. at 504, 96 S.Ct. 1691, such an impression was cumulative and thus harmless error because testimony offered on behalf of petitioner suggested that he was prone to commit violent crime, and that due to his alleged mental disease he was unable to conform his conduct to the law. Indeed, the nature of petitioner's defense forced him to concede that he actually committed the offense. Allowing petitioner to sit elsewhere than the dock would not have altered this testimony or appreciably tempered its effect on the jury. Therefore, even if there was any constitutional impairment of the presumption of innocence or the fairness of the trial, I rule it was harmless beyond a reasonable doubt.

PEREMPTORY CHALLENGES

Prior to empanelling the jury, the judge at petitioner's trial ruled that defendant must personally exercise his peremptory challenges. Counsel objected to the requirement that petitioner speak, on the ground that it might interfere with the insanity defense by impressing the jurors with petitioner's competency. In accordance with the ruling, the defendant spoke in open court during the voir dire, stating to the court and each juror, either "I am content," or "I challenge." Later, in the portion of his final argument rebutting Walker's insanity defense the prosecutor stated:

> Ask yourself about this particular defendant. What do you think? Do you think he knew what he was doing when he stood up there and said, "I am content with this juror? I am content with this juror? I am content with

> this juror?" Do you think he knew what he was doing then?

On appeal, petitioner argued that the compelled personal exercise of peremptory jury challenges, as well as the prosecutor's prejudicial and confusing reference to the exercise in his summation, violated the defendant's privilege against self-incrimination and his right to a fair and impartial jury. The Supreme Judicial Court rejected both claims of error. The Court held "sound" the long-standing practice in the Commonwealth of requiring one accused of first-degree murder "after consultation with his attorney, personally to announce his contentment or dissatisfaction with prospective jurors . . .", *Commonwealth v. Walker, supra*, 350 N.E.2d at 689, *citing Commonwealth v. Millen*, 289 Mass. 441, 476-77, 194 N.E. 463, *cert. denied*, 295 U.S. 765, 55 S.Ct. 924, 79 L.Ed. 1706 (1935). *See generally Swain v. Alabama* 380 U.S. 202, 212-20 & n.9, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965). A defense of insanity at the time of commission of the offense did not derogate from the wisdom of or the protection afforded by the practice. *Id.* 350 N.E.2d at 689-90. Although the Court criticized the prosecutorial comment as ill-advised, it believed any adverse effect was cured by instructions to the jury.

In the instant application, petitioner does nothing more than repeat, though with some embellishment, the Fifth, Sixth, and Fourteenth Amendment objections he raised earlier. Petitioner's contentions that the prosecutor's argument impaired his rights to confrontation and to make peremptory challenges are totally without merit. *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 n.15, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974). Petitioner also asserts that requiring him to appear to make substantial decisions before the jurors incriminated him, because it assisted the Commonwealth's proof of an ultimate

element of its case, namely his sanity at the time of the offense. *See Commonwealth v. Kostka*, 350 N.E.2d 444, 451, 452 (Mass. 1976). That argument is overstated. An intelligent and knowing peremptory challenge by a defendant is most probative of that defendant's competency *at the time of trial* to consult with his lawyer and to rationally, as well as factually, understand the proceedings against him. *See Dusky v. Ohio*, 362 U.S. 402, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960) (per curiam). The central issue at this trial, however, was petitioner's sanity *at the time of the offense*, some seven months earlier. Although it is conceivable that a juror could infer past sanity from a demonstration of present competency, the logical leap is a substantial one. Indeed, the unlikelihood of such an inference underlay a much earlier rejection by the Supreme Judicial Court of essentially the same argument: To compel the defendants personally to challenge jurors at a trial for which they were found by preliminary examination to be competent and presumed to be competent, added nothing by way of evidence to the ultimate issue of their responsibility for the crime committed. *Commonwealth v. Millen, supra*, 289 Mass. at 477, 194 N.E. at 480. In any event, a similar inference from a display of speech and thought processes could easily be drawn from petitioner's failure to disrupt the trial with bizarre behavior, from his obvious ability to consult with his attorney, and to have numerous whispered conversations with his attorney, and from his apparent comprehension of the nature of the proceedings. Thus, acceptance of petitioner's argument would necessitate isolating every defendant asserting an insanity defense from the jury's view so that no potentially adverse inferences could be drawn from any rational demeanor or conduct on the part of defendant during the trial. Such a procedure is unwarranted, and, if compelled, would probably be violative of the Confrontation Clause. Finally, the exercise of the challenges does not fall within the terms of

the Fifth Amendment privilege, because the testimonial or communicative *content* of the words spoken is not probative of anything incriminating. *See generally United States v. Dionisio*, 410 U.S. 1, 5-7, 93 S.Ct. 764, 35 L.Ed.2d 67 (1973).

The second prong of petitioner's argument is that the prosecutor's comment on the exercise of the challenges was fundamentally unfair, prejudiced his right to an impartial jury, and transformed the prosecutor into a witness not subject to cross-examination. It is highly improper for a prosecutor to refer in his closing argument to matters outside of the evidence, or to go beyond the fair inferences from the evidence. In this case, the prosecutor did both: The peremptory challenges were not evidence, nor could there be any fair inference that the requirement, of the actual exercise of personal challenges, was probative of sanity at the time of the offense. At a minimum, this prosecutor breached recognized standards of professional conduct. *See, e.g., A. B. A. Standards Relating to the Prosecution Function and the Defense Function* (Approved Draft, 1971), Standards 5.8(a), 5.9.

The question presented here, however, is whether this unfair prosecutorial argument amounted to the denial of a constitutional right. As in *Donnelly v. DeChristoforo*, 416 U.S. 637, 643, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974), *rev'g*, 473 F.2d 1236 (1st Cir. 1973), the prosecutor's comment is essentially challenged on due process grounds. Though precedential only as a plurality opinion, *Donnelly* counsels a distinction between ordinary, albeit improper trial error of a prosecutor, and the sort of egregious prosecutorial misconduct that amounts to a denial of constitutional due process. *Id.* at 647-48 & n.23, 94 S.Ct. 1868. Such an analysis is most appropriately applied to summations, for as the Court observed:

> Isolated passages of a prosecutor's argument, billed in advance to the jury as a matter of opinion not of evidence,

do not reach the same proportions [as using false evidence]. Such arguments, like all closing arguments of counsel, are seldom carefully constructed *in toto* before the event; improvisation frequently results in syntax left imperfect and meaning less than crystal clear. While these general observations in no way justify prosecutorial misconduct, they do suggest that a court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations. . . . [H]ere there was neither the introduction of specific misleading evidence important to the prosecution's case in chief nor the nondisclosure of specific evidence valuable to the accused's defense. There were instead a few brief sentences in the prosecutor's long and expectably hortatory closing argument which might or might not suggest to a jury that the respondent had unsuccessfully sought to bargain for a lesser charge. We find nothing in *Brady* [*v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963)] to suggest that due process is so easily denied. *Id.* at 646-47, 94 S.Ct. at 1873. *See also Cupp v. Naughten*, *supra*, 414 U.S. at 146-47, 94 S.Ct. 396.

Although the trial court did explain to the jury the nature of and the reason for defendant's personal exercise of the peremptory challenges, petitioner would ascribe constitutional error to the court's failure to specifically instruct the jury to disregard the improper argument on the subject. That contention must be rejected. Both counsel and the court had admonished the jury that none of the argument by the lawyers constituted evidence. Moreover, the court instructed that: "Evidence is what you get from the lips of witnesses under

oath together with any exhibits. . . ." By implication, anything that the jury observed prior to the testimony of the first witness was neither evidence nor a predicate for the drawing of inferences. Unlike the arguments in the cases cited by petitioner, these remarks were not highly inflammatory, were not cumulative of other serious error, and did not unduly confuse the issue of mental responsibility at the time of the offense, considering the charge as a whole. *Cf. United States v. Williams*, 523 F.2d 1203, 1207-08, 1209-10 (5th Cir. 1975); *United States v. Schwartz*, 325 F.2d 355, 357-58 (3d Cir. 1963). Thus, they did not intrinsically demand a specific curative instruction, and, under the broad standards of *Donnelly* and *Cupp*, did not offend due process in light of all the circumstances of this case.

PRESUMPTION OF SANITY

Petitioner's final contention is that the trial court's instructions unconstitutionally reduced the Commonwealth's burden of proof on the issue of sanity. The following three portions of the instructions are claimed to be violative of the Due Process Clause:

1. "Now, the defense has raised the issue of legal mental capacity to commit a crime. Generally, when a person is charged with a criminal offense and there is no evidence introduced concerning his mental condition, under such circumstances it is to be presumed that the person charged with the crime was of sufficient mental capacity to commit it. We assume under those circumstances, as I just recently indicated, that the man has the mental capacity to commit a crime. The law states that in such cases there is a presumption that a person is sane";

2. "In assessing a defendant's mental responsibility for crime, the jury should weigh[1] the fact that a great majority of men are sane and the probability that any particular man is sane. Now this assessment is to be made in each case in the light of the evidence introduced, the circumstances that you have heard. The jury are the sole judges of the credibility and weight of all evidence on the issue of insanity. That includes the testimony of those who gave opinions as to legal mental capacity.

The opinion of such a witness is not a required conclusion. The jury may believe, but is not compelled to believe, any such testimony or opinion given by an expert. . . . [I]t is for the jury to determine whether or not the fact that a great majority of men are sane and the probability that any particular man is sane may be deemed to outweigh the evidential value of any expert testimony that he is insane."

3. "The Commonwealth must prove that the defendant was reasonably sane beyond a reasonable doubt . . .."

On appeal, petitioner first argued that the instruction that the probability of defendant's sanity might outweigh contrary expert evidence unconstitutionally reduced or shifted the prosecution's burden of proof. But the Supreme Judicial Court held that since the jury was told emphatically (and repeatedly) that the Commonwealth must prove sanity beyond a reasonable doubt,[2] there was no reversal of the prosecution's burden. *Commonwealth v. Walker, supra,* 350 N.E.2d at 699-700. The court reasoned further that the judge's instruction did not permit a sanity finding based solely on the presumption because the jury had been instructed to consider "*all* the evidence." Accordingly, the jurors might have considered probative of sanity such evidence of petitioner's planned and intelligent criminal conduct as was supplied by accomplice testimony, eyewitness testimony, observer testimony shortly after the crime, and the circumstances of the robbery and murder themselves. *Id.* 350 N.E.2d at 700-01.

[1] In his brief, petitioner's quotation of this last instruction substitutes the word "weight" for the word "weigh." The official transcript, at 1673, uses the word "weigh." This Court, like the Supreme Judicial Court, *Commonwealth v. Walker, supra,* 350 N.E.2d at 699, will rule on the basis of the precise language set forth in the transcript.

Petitioner also argued that the challenged instructions violated the due process requirements of *Barnes v. United States,* 412 U.S. 837, 93 S.Ct. 2357, 37 L.Ed.2d 380 (1973), and *Turner v. United States,* 396 U.S. 398, 90 S.Ct. 642, 24 L.Ed.2d 610 (1970), with respect to the use of presumptions and inferences to establish an element of a criminal offense. The Supreme Judicial Court rejected this contention, holding that "since sanity is not an element of the crimes charged," that line of Supreme Court authority was inapposite. *Commonwealth v. Walker, supra,* 350 N.E.2d at 700 & n.26, *quoting Commonwealth v. Kostka, supra.*

Petitioner then contended that the trial judge vitiated the burden of proof by instructing the jury that in order to convict, it need only find the petitioner "reasonably sane beyond a reasonable doubt," The Supreme Judicial Court disagreed, holding that the trial judge had made an "unfortunate slip of the tongue" which was remedied by "repeated references to

[2] *E.g.*:

> The burden is upon the Commonwealth to prove that the defendant was legally sane beyond a reasonable doubt and that he was legally responsible for any criminal offense that he may have committed. [Transcript at 1671]

the correct standard of 'legally sane beyond a reasonable doubt.'" *Commonwealth v. Walker, supra*, 350 N.E.2d at 699 n.23. Finally, petitioner urged that the jury's finding of sanity was against the weight of the evidence and that the presumption-of-sanity instruction, in these circumstances, impermissibly confused the jury. The Supreme Judicial Court believed otherwise. *Id., supra*, 350 N.E.2d at 698-701.

In his application to this Court, petitioner vigorously renews these four rejected contentions. First, petitioner argues that the second challenged instruction allowed the jury to find the defendant sane solely on the statistical probability that most defendants are sane. The likelihood of this path of juror analysis is said to follow from the fact that the Commonwealth introduced no expert evidence to rebut defense testimony supporting insanity which was offered by petitioner's mother, a psychiatric counselor, a psychiatrist, and a clinical psychologist. This view of the evidence introduced at trail is overly narrow. It ignores the principles that unrebutted expert or lay testimony may be disbelieved by a jury because of a witness' interest, demeanor, or unpersuasiveness, *see United States v. Dube*, 520 F.2d 250, 251-52 & n.1 (1st Cir. 1975), that the most convincing proof of a defendant's mental state at the time of the offense is often his conduct immediately before, after, and during its commission, and that the failure of the government to introduce any affirmative evidence of sanity does not automatically prevent a jury finding that defendant was sane beyond a reasonable doubt, J. Moore, *Moore's Federal Practice* ¶ 26.04[4], at 26-41 (1975). It is worth noting that neither this nor any portion of the mental capacity charge instructed the jurors that they could rely in this case solely on the presumption of sanity or the "mere statistical probability" of sanity. Contrary to petitioner's suggestive reading, the charge also directed the jurors "to consider and look at the whole evidence regarding the mental condition of the defendant. . . .

[and] to determine again on all the evidence and all of the circumstances whether the defendant did or did not lack mental capacity to commit a crime." In this context, the "weighing" of the presumption and the expert testimony is explainable as an inartful but harmless-error description of the rebutting of a presumption.

For the obvious reasons of sympathy and interest, the jury could have discounted the probative worth of the testimony by petitioner's mother concerning a long pattern of uncommon behavior. Dr. Gatti's opinion of insanity, based as it was only on a single interview of less than two hours some eighteen months before the offense could well have been rejected by the jurors because of the lack of a more substantial and up-to-date basis of observation, and because of Gatti's concession that Walker's condition did not warrant hospitalization. Dr. Seymour's opinion, though grounded in an extensive consultation, was flawed to some degree by the date of examination, some five months after the offense. *Cf. United States v. Dube, supra*, at 252 & n.2. Ms. Helms, who was not qualified as an expert, added only that she had consulted with Terrell Walker on numerous occasions and, as a result, sought to place him in a mental hospital and refer him to Dr. Gatti.

The election by the Commonwealth to call no medical witnesses in rebuttal at the conclusion of the defendant's case, in my judgment amounted to a tactical decision by the Commonwealth's counsel to risk sustaining its burden of proving sanity beyond a resonable doubt by reliance on the cumulative effect of the accomplice, eye witness, and subsequent witness testimony of witnesses called by it, plus the testimony elicited during the cross-examination of defendant's witnesses.[3] *See id.* at

[3] Petitioner cites a number of cases for the proposition that judgment of acquittal is demanded as a matter of law when the prosecution offers no expert medical testimony to rebut similar defense testimony. *United States v. Smith*, 437 F.2d 538, 540-41 (6th Cir. 1970); *Hartford v. United States*, 362

251. Ample evidence from non-medical sources, capable of supporting the jury's finding of sanity, *United States v. Dube*, *supra*, at 253 & n.4, 255 (Campbell, J., concurring); *Commonwealth v. Laliberty*, 366 N.E.2d 736, 742 (Mass.1977), suggested that petitioner planned the robbery, premeditated the shooting, effected an escape, and instigated a concealment. The availability of such evidence for jury consideration, and the Court's proper instruction that "*all* the evidence" was to be evaluated thus lead me to reject petitioner's contention that his conviction rests on *nothing more than* a statistical probability of sanity.

Petitioner's second argument requests an adjudication of unconstitutionality with respect to the Commonwealth's practice of allowing the presumption of sanity to go to the jury for its evidential value, even after the introduction of defense evidence of insanity. *See Commonwealth v. Kostka*, *supra*, 350 N.E.2d at 453. The overwhelming majority of the states and of the federal Circuits follow a different rule: if a defendant raises the defense of insanity and offers some quantum of evidence in its support, the presumption of sanity drops out of the case as a matter of law and never reaches the jury. *E.g.*, *United States v. Dube*, 520 F.2d 250, 251 (1st Cir. 1975); *United States v. Jacobs*, 473 F.2d 461, 464 (8th Cir. 1973), *cert. denied*, 412 U.S. 920, 93 S.Ct. 2740, 37 L.Ed.2d 147 (1972); *Hartford v. United States*, 362 F.2d 63, 64 (9th Cir. 1966); *cert. denied*, 385 U.S. 883, 87 S.Ct. 174, 17 L.Ed.2d 110 (1966); *Fitts v. United States*, 284 F.2d 108, 112 (10th Cir. 1960); *Commonwealth v. Vogel*, 440 Pa. 1, 268 A.2d 89, 95-96

F.2d 63, 64, 67 (9th Cir. 1966); *McKenzie v. United States*, 266 F.2d 524, 527-28 (10th Cir. 1959); *Fielding v. United States*, 102 U.S.App.D.C. 167, 251 F.2d 878, 880 (1957). *But see United States v. Dube*, 520 F.2d 250, 251 (1st Cir. 1975). All, however, are distinguishable as federal prosecutions governed by the nonconstitutional holding of *Davis v. United States*, 160 U.S. 469, 487-88, 16 S.Ct. 353, 40 L.Ed. 499 (1895).

(1970). However, under the approach of Massachusetts as well as that of the majority of jurisdictions, a reasonable-doubt burden of persuasion on the issue of sanity rests squarely on the prosecution and never shifts, and the jury was so charged. *E.g.*, *Commonwealth v. Kostka*, *supra*, 350 N.E.2d at 451. The only difference is that under Massachusetts law the prosecution's burden to prove sanity beyond a reasonable doubt may be assisted by the presumption. Although continued evidentiary use of an arguably rebutted presumption has been criticized by legal commentators, *e.g.*, 9 J. H. Wigmore, *Evidence* § 2491, at 290 (3d ed. 1940), and rejected by most other jurisdictions, *but see United States v. Harper*, 450 F.2d 1032, 1038-39 (5th Cir. 1971); *Keys v. United States*, 120 U.S.App.D.C. 343, 345, 346 F.2d 824, 826 (1965), *cert. denied*, 382 U.S. 869, 86 S.Ct. 144, 15 L.Ed.2d 108 (1965); *People v. Silver*, 33 N.Y.2d 475, 482, 354 N.Y.S.2d 915, 921, 310 N.E.2d 520, 524 (1974), unpopularity, or even uniqueness, does not necessarily equate with unconstitutionality. *Cf. Patterson v. New York*, 432 U.S. 197, 211, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977); *Leland v. Oregon*, 343 U.S. 790, 798-99, 72 S.Ct. 1002, 96 L.Ed. 1302 (1952). The Supreme Judicial Court is the ultimate expositor of the law of Commonwealth, and its construction of the scope of the insanity defense and the presumption existing under state law is binding on this Court, since none of the exceptions to the doctrine are applicable. *Mullaney v. Wilbur*, 421 U.S. 684, 691 & n.11, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975). In addition, the United States Supreme Court has recently cautioned lower federal courts to ponder carefully any Due Process Clause challenges in this area of state allocations of the burden of proof:

> [W]e should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States. Among other things, it is "normally within

> the power of the State to regulate procedures under which its laws are carried out, including the burden of producing evidence and the burden of persuasion," and its decision in this regard is not subject to proscription under the Due Process Clause unless "it offends some principle of justice so deeply rooted in the traditions and conscience of our people as to be ranked as fundamental." [citations omitted]. *Patterson v. New York, supra,* 432 U.S. at 201-02, 97 S.Ct. at 2322.

As illustrated by the thoughtful analysis in *Commonwealth v. Kostka, supra,* 350 N.E.2d at 454-58, Massachusetts carefully distinguishes, and limits, the procedural aspect of the presumption of sanity from the substantive operation of its underlying facts. Only the later facts, and the possible inferences flowing therefrom, are weighed by the jury. *Id., supra,* 350 N.E.2d at 454. Those very facts "are considered to be part of the jury's 'common experience that most people . . . are sane.'" *Id., supra,* 350 N.E.2d at 454, 457-58, *quoting United States v. Dube, supra,* at 255 (Campbell, J., concurring). Thus, the implementation of the minority position in Massachusetts is carefully circumscribed and always coupled with an undiminished burden of persuasion on the prosecution to prove the fact of sanity beyond a reasonable doubt. In my judgment, this practice of allowing the jury only to consider the facts underlying the presumption does not offend the fundamental principles of justice underlying the Due Process Clause. Indeed, in the seminal but nonconstitutional decision in *Davis v. United States,* 160 U.S. 469, 16 S.Ct. 353, 40 L.Ed.499 (1895), the Supreme Court specifically contemplated that the presumption of sanity would go to the jury for its determination as to whether it had been so far impaired by contrary evidence as to be overcome:

> Giving to the prosecution, where the defence is insanity, the benefit in the way of proof of the presumption in favor of sanity, the vital question from the time a plea of not guilty is entered until the return of the verdict, is whether upon all the evidence, by whatever side adduced, guilt is established beyond reasonable doubt. If the whole evidence, including that supplied by the presumption of sanity, does not exclude beyond reasonable doubt the hypothesis of insanity, of which some proof is adduced, the accused is entitled to an acquittal of the specific offense charged. *Id.* at 487-88, 16 S.Ct. at 858.

Lastly, as to this issue the Commonwealth's practice receives *a fortiori* support from more recent decisions by the Court, which have upheld more stringent state practices placing the burden of persuasion on the issue of insanity upon the defendant, in terms of an affirmative defense requiring a showing by either a preponderance of the evidence or beyond a reasonable doubt. *Patterson v. New York, supra,* 432 U.S. at 206-11, 97 S.Ct. 2319; *Rivera v. Delaware,* 429 U.S. 877, 97 S.Ct. 226, 50 L.Ed.2d 160 (1976) (appeal dismissed for want of a substantial federal question); *Leland v. Oregon, supra,* 343 U.S. at 798-99, 72 S.Ct. 1002; *cf. Mullaney v. Wilbur, supra,* 421 U.S. at 703 n.31, 95 S.Ct. 1881. *See also Grace v. Hopper,* 566 F.2d 507, 509-10 (5th Cir. 1978).

Petitioner's final two arguments also must be dismissed. In the context of the entire charge, the trial judge's inadvertent statement that the prosecution had only to prove petitioner "reasonably" sane beyond a reasonable doubt did not so lessen the Commonwealth's burden of proof as to deprive Walker of due process. As the Supreme Judicial Court observed, the lengthy charge contained repeated references to the correct standard of "legally sane beyond a reasonable doubt." *Com-*

monwealth v. Walker, supra, 350 N.E.2d at 699 n.23. The slip of the tongue was so isolated that it surely did not taint the entire trial. *See Cupp v. Naughten, supra*, 414 U.S. at 147, 94 S.Ct. 396. I also agree with the Supreme Judicial Court that the portion of the charge describing the "general" operation of the presumption in cases "where no evidence is presented by either side on the issue of sanity" was introductory, and was offered to facilitate juror comprehension of the later-explained, more complex operation of the presumption when an insanity defense is raised. *See Commonwealth v. Walker, supra*, 350 N.E.2d at 699. Accordingly, I am not persuaded that these two aspects of the insanity instruction, which should not be viewed in artificial isolation, rendered it so confusing and incorrect as to make the errors rise to constitutional dimension. *See generally Cupp v. Naughten, supra*, 414 U.S. at 147-50, 94 S.Ct. 396; *Leland v. Oregon, supra*, 343 U.S. at 800, 72 S.Ct. 1002. Citing *Barnes v. United States, supra*, and *Turner v. United States, supra*.

Petitioner contends that the presumption of sanity runs afoul of the Due Process Clause because there was a "sufficiently real possibility" that the presumed fact did not follow from the proved[4] basic fact. The Supreme Judicial Court distinguishes *Barnes* and *Turner* as concerned with the proscribed use of inferences to establish an element of the crime charged. Sanity, in the Supreme Judicial Court's view, was not an "element" of any given crime. Rather, sanity only became a necessary "fact" of the crime charged in those few cases in which an insanity defense is maintained. *Commonwealth v. Walker, supra*, 350 N.E.2d at 700 & n.26; *Commonwealth v. Kostka, supra*, 350 N.E.2d at 455-56 & n.16. Here petitioner challenges the significance of this distinction on the basis of the

[4] The "proved" fact, *i.e.* that most people are sane, more accurately should be characterized as a judicially noticed fact.

holding in *In Re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970), that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." But regardless of the correctness of the state court's distinction, to which deference must be accorded, *see, e.g., Patterson v. New York, supra*, 432 U.S. at 201-02, 97 S.Ct. 2319, petitioner's challenge fails in light of the Supreme Court's recent refusals to literally apply *Winship* to even harsher state procedures relating to the defense of insanity. *Id.* at 205-07, 210-11, 97 S.Ct. 2319; *Rivera v. Delaware, supra*. *See also United States v. Dube, supra*, at 255 (Campbell, J., concurring).

In addition, petitioner's interpretation of the presumption of sanity is mistaken. The commonly accepted version of the presumption is that because of the judicially noticed fact that most persons are sane, there is a presumption, which is rebuttable, that any particular defendant is sane. Petitioner would alter this understanding in any case in which the presumption is submitted to the jury. He contends that in cases where "the defendant is a man who has satisfied the burden of production by presenting sufficient expert testimony of his insanity," the presumed fact, "that this defendant is sane," does not follow from the judicially noticed fact. But petitioner's successful carrying of his burden of production does not alter the character of the underlying judicially noticed fact. Rather, under the Massachusetts procedure, it only calls into question for the jury whether the presumed fact of this defendant's sanity has been rebutted, by defense witnesses or proved beyond a reasonable doubt by all the evidence relied upon by the Commonwealth. *E.g., Keys v. United States, supra*, 120 U.S.App. D.C. at 345, 346 F.2d at 826; *People v. Silver, supra*, 33 N.Y.2d at 482, 354 N.Y.S.2d at 921, 310 N.E.2d at 524. *See Barnes v. United States, supra*, 412 U.S. at 842-43, 93 S.Ct. 2357.

Finally, much of petitioner's argument under *Barnes* and *Turner* is based on the erroneous premise that the trial judge allowed the jury to support the conviction *solely* on the presumption of sanity. As discussed above, that clearly was not the case. The jury was instructed to consider all of the evidence, which included accomplice, eyewitness, and subsequent observer testimony bearing on the issue of petitioner's sanity at the time of the offense.

For all these reasons, I rule that the utilization of the presumption of sanity in this case did not unconstitutionally reduce the burden of persuasion on the prosecution or otherwise violate petitioner's rights under the Due Process Clause of the Fourteenth Amendment. *Cf. United States v. Dube, supra*, at 254-55 (Campbell, J., concurring).

Accordingly, because of the absence of federal constitutional error at Walker's trial, the petition for a writ of habeas corpus should be denied and respondent's motion to dismiss the petition should be granted.

Appendix C.

UNITED STATES COURT OF APPEALS
FOR THE
FIRST CIRCUIT

TERRELL WALKER,
PETITIONER, APPELLANT,
v.
FREDERICK BUTTERWORTH ET AL.,
RESPONDENTS, APPELLEES.

No. 78-1448

June 7, 1979

Stephen L. Saltonstall and Eric D. Blumenson, Boston, Mass., with whom Norman S. Zalkind, Boston, Mass., was on brief, for petitioner, appellant.

Robert S. Potters, Asst. Atty. Gen., Crim. Div., Boston, Mass., with whom Francis X. Bellotti, Atty. Gen., and Stephen R. Delinsky, Asst. Atty. Gen., Chief, Crim. Bureau, Boston, Mass., were on brief, for respondents, appellees.

Before COFFIN, Chief Judge, BOWNES, Circuit Judge, PETTINE, District Judge.*

PETTINE, District Judge.

This appeal of a dismissal of a petition for a writ of habeas corpus, 28 U.S.C. § 2254, requires the Court to inspect the constitutional validity of evidentiary and procedural rules traditionally practiced at criminal trials in Massachusetts.

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*Of the District of Rhode Island, sitting by designation.

At the state court trial, the defendant, Terrell Walker, was convicted of armed robbery and first degree murder; he was found to have successfully organized, with two others, the robbery of the Suffolk Loan Company, during the course of which he shot and killed a policeman stationed therein. The government's evidence pictured Walker as the leader by showing that he dictated which store was to be robbed, supplied one partner with a weapon and instructed him in its use, arranged for the other partner to drive the getaway car, directed which jewelry display cases to open, arranged the eventual escape and admonished them not to flee prematurely.

Walker did not deny any of this. Instead, he pleaded insanity and introduced evidence both expert and lay, as to his mental condition at the time of the crime. Two doctors testified that examinations of Walker revealed a paranoid character disorder and that on the date of the homicide he was not able to conform his conduct to the law and unable to appreciate the wrongfulness of his act.

The government did not contradict the defendant's medical testimony. Instead, to prove his sanity circumstantially, it relied on the lay evidence showing Walker's calculated organization of the robbery. In addition it leaned heavily upon the "presumption of sanity", a judicially created presumption that carries evidentiary weight in Massachusetts.

Walker appealed his conviction to the Massachusetts Supreme Judicial Court; the court rejected his numerous assignments of error. *Commonwealth v. Walker*, 370 Mass. 548, 350 N.E.2d 678 (1976). Walker then renewed his objections in this habeas corpus petition to the federal district court. Chief Judge Caffrey agreed with much of the reasoning of the Supreme Judicial Court and denied the petition. It is this denial that is now before this court.[1]

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[1] The petitioner renewed all his present claims at each appellate stage. Both sides agree that exhaustion is not an issue in this case.

The defendant argues as errors, the trial judge's instructions as to the "presumption of sanity" and two procedures employed in the trial as ordered by the court, *i.e.*, that defendant personally exercise his peremptory challenges and not sit at counsel table but be confined in the "prisoner's dock" throughout the trial.

The judge followed Massachusetts practice and required defendant to exercise his peremptory challenges personally after consulting with his lawyer. Defendant's lawyer, noting that sanity was the critical issue in this case, objected to this practice. It further developed that during his closing argument, the prosecutor, in what was later described as unprofessional conduct, highlighted Walker's personal exercise of the peremptory challenges and utilized them as evidence of Walker's sanity.

> Ask yourself about this particular defendant. What do you think? Do you think he knew what he was doing when he stood up there and said, "I am content with this juror? I am content with this juror? I am content with this juror?" Do you think he knew what he was doing then?

Walker's attorney also objected to this prosecutorial tactic and requested a specific cautionary instruction which was not granted. Instead, the trial judge informed the jury that the petitioner was required to make the challenges and gave a generalized instruction which noted that either lawyer's arguments were not to be considered as evidence.

Defendant's counsel likewise objected when the trial judge confined Walker to the prisoner's dock. Massachusetts practice allows a judge to utilize his discretion as to this practice and, in the present case, the court apparently required its use

as it had done in all first degree murder trials. The prisoner's dock is described as being about four feet square and four feet high, open at the top so that the defendant's head and shoulders can be seen by the jury. The lawyer may freely go to the box to consult with his client.

Finally, Walker's counsel also objected to various portions of the lengthy jury charge.

At the outset of the charge, the trial judge attempted to explain to the jurors why the defendant had taken exceptions to evidentiary rulings during the trial, although the government had not. In explaining that the defendant had the right to except to a ruling in order to preserve the point for appeal, the judge noted that only the defendant had a right to an appeal; this jury instruction was accompanied by cautionary language demanding that the jury's verdict be free of surmise, conjecture, bias, or hostility. As the Massachusetts Supreme Judicial Court suggested, such mention of the appellate mechanics is unwise. *Commonwealth v. Walker*, 350 N.E.2d 678, 687 (1976). However, the language and context of this particular instruction evidences an intent to protect the defendant from any jury confusion or hostility that may have been aroused by the frequent taking of exceptions. Such an instruction is not unduly prejudicial and is not an error of constitutional magnitude. *See Cupp v. Naughten*, 414 U.S. 141, 94 S.Ct. 396, 38 L.Ed.2d 368 (1973).

The judge began his discussion of the sanity issue by describing the conclusive effect of the "presumption of sanity" when the defendant fails to make sanity an issue.[2] These comments

[2]The "presumption of sanity" does place the burden of production, or burden of "going forward" with the evidence, upon the defendant. Thus, the defendant must raise the issue of insanity by introducing some supporting evidence. If defendant fails to raise the issue, he is conclusively presumed sane. The defendant in this case does not challenge this particular aspect of the presumption. Defendant contests the effect that the presumption has on

were merely introductory and, when taken in context, might be considered superfluous, but not unduly prejudicial. *Cupp v. Naughten, supra.*

The judge then emphasized that the jury must "consider and look at the whole evidence regarding the mental condition of the defendant." In this vein, the judge noted that the expert testimony was valuable evidence but that the medical opinions were not binding upon the jury; as the "sole judges of the credibility and weight of all evidence on the issue of insanity", the jury "may believe, but is not compelled to believe, any . . . testimony or opinion given by an expert". The jury was also told that "[i]n assessing a defendant's mental responsibility for crime, the jury should weigh the fact that a great majority of men are sane and the probability that any particular man is sane". In applying this "presumption of sanity" to the present case, the judge reiterated "it is for the jury to determine whether or not the fact that a great majority of men are sane and the probability that any particular man is sane may be deemed to outweigh the evidential value of any expert testimony that [a person] is insane". As to the burden of persuasion on this issue, the trial judge repeatedly noted that the Commonwealth had the burden of proving Walker legally sane beyond a reasonable doubt.

Aside from the two superfluous instructions already addressed, Walker concedes that the judge's jury instruction and trial procedures fully complied with traditional Massachusetts practice and procedure. The petitioner, however, argues that the well established Massachusetts "presumption of sanity" relieves the state of its constitutional burden of proving defendant's sanity beyond a reasonable doubt. *See Mullaney v. Wilbur*, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975).

the government's burden of persuasion once the issue of sanity is properly raised.

Defendant also asserts that confinement in the "prisoner's dock" during the trial erodes a defendant's presumption of innocence. Walker finally argues that the forced personal exercise of his peremptory challenges reflected upon his sanity and violated his fifth amendment privilege against self-incrimination. We find this last contention sufficiently persuasive to require a granting of this habeas corpus petition.

The Presumption of Sanity

Exactly what constitutes a presumption is a troubling question. In an attempt to describe presumptions, commentators have likened these evidentiary creatures to "bursting bubbles"[3] and to "bats of the law flitting in the twilight".[4] These analogies may be more colorful than illuminating. Surveying the law of presumption, Dean McCormick noted that the "use of the term presumption is only confusing". McCormick, Evidence § 346, at 830 (1972). *See also* Hecht & Pinzler, Rebutting Presumptions: Order out of Chaos, 58 B.U.L.Rev. 527 (1978).

Heeding Dean McCormick's warning, the Massachusetts Supreme Judicial Court, in a recent decision, carefully defined the operation of the "presumption of sanity". *Commonwealth v. Kostka*, 370 Mass. 516, 350 N.E.2d 444 (1976). Massachu-

[3] *See* J. Thayer, A Preliminary Treatise on Evidence at Common Law, 313-52 (1898).

[4] 9 Wigmore, Evidence § 2491. *See also* Bohlen, The Effect of Rebuttable Presumptions of Law Upon the Burden of Proof, 68 U.Pa.L.Rev. 307, 314 (1920) where presumptions are described: "Like Maeterlinck's male bee, having functioned they disappear." Judges have also discussed, and sometimes confused, the law of presumptions. Referring to the law of presumptions, Learned Hand complained: "Judges have mixed it up until nobody can tell what on earth it means. . . ." 18 ALI Proceedings 217-18 (1941).

setts courts have long held that once sanity is an issue the burden of proof rests upon the Commonwealth to prove sanity beyond a reasonable doubt. *Commonwealth v. Smith*, 357 Mass. 168, 258 N.E.2d 13 (1970). The judicially created "presumption of sanity", however, aids the Commonwealth in meeting this burden because the jury is always instructed to consider the presumption of sanity when weighing the evidence. Thus, Massachusetts adopts a minority position in that the "presumption of sanity" always remains, carrying "evidential value", and may never be kept from the jury by introducing evidence of insanity. *Commonwealth v. Kostka, supra*, at 453. This definition of the "presumption of sanity" allows the Commonwealth to rely upon the presumption "to meet its burden even in a case where there is uncontradicted expert testimony that the defendant was insane at the time he committed the crime in question." *Id.* at 451.

Instructing the jury to weigh this presumption necessarily lessens the government's burden of proof. The use of this evidentiary device can be viewed as artificially aiding the government in satisfying its burden of production or as diluting the standard of "beyond a reasonable doubt". Either way, the standard of proof has been altered by a judicially created mechanism. The United States Supreme Court has often scrutinized presumptions that operate in such an evidentiary fashion.

The Supreme Court has set down certain due process guidelines that must be met when a fact is to be presumed by a jury. In *Leary v. United States*, 395 U.S. 6, 89 S.Ct. 1532, 23 L.Ed.2d 57 (1969), the Supreme Court held that a statutory presumption was arbitrary and unconstitutional "unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend". *Id.* at 36, 89 S.Ct. at 1548. *See*

also Turner v. United States, 396 U.S. 398, 90 S.Ct. 642, 24 L.Ed. 2d 610 (1970).

In light of the Court's pronouncement in *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970), that the due process clause "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime . . .", the Supreme Court has suggested that a presumption that supplies "[a] fact necessary to constitute the crime" must meet the reasonable doubt standard. Thus, *Barnes v. United States*, 412 U.S. 837, 93 S.Ct. 2357, 37 L.Ed.2d 380 (1973), set forth a dual standard: "if a statutory inference submitted to the jury as sufficient to support conviction satisfies the reasonable-doubt standard (that is, the evidence necessary to invoke the inference is sufficient for a rational juror to find the inferred fact beyond a reasonable doubt) as well as the more-likely-than-not standard, then it clearly accords with due process." *Id.* at 843, 93 S.Ct. at 2361.[5]

[5]In dismissing Walker's appeal the Massachusetts Supreme Judicial Court stressed that the "presumption" itself was not evidence, *Commonwealth v. Walker*, 350 N.E.2d 678, 700 (1976); rather, the jury was to "weigh the facts underlying the presumption and the inferences that may follow from [the] facts . . .." *Commonwealth v. Kostka*, 350 N.E.2d 444, 454 (1976). Whether the "presumption of sanity" is an inference or a presumption or a creature possessing "characteristics of both presumptions and inferences", *id.* at 454, makes no constitutional difference. The Supreme Court has chosen to scrutinize presumptions and inferences identically if they operate to shift the burden of production and are to be given evidentiary weight by a jury in criminal cases. *See Barnes v. United States*, 412 U.S. 837, 841-45, 93 S.Ct. 2357, 37 L.Ed.2d 380 (1973).

The *Barnes* case concerned the traditional common law inference that knowledge necessary for conviction may be drawn from the unexplained possession of recently stolen goods. As with the statutory presumptions involved in *Leary* and *Turner*, this "inference" operated to shift the burden of producing rebutting evidence onto the defendant. All three of the above cases are similar to the present case in that the jury was clearly instructed that they were permitted, but not required to find the presumed fact.

The Supreme Court made no distinction between the *Barnes* common law "inference" and a statutory presumption. In fact, the Court appeared to use the two terms interchangeably.

Despite the evidentiary effect of the Massachusetts "presumption of sanity" and the Supreme Court's careful review of presumptions in criminal cases, the particular presumption in this case need not meet the standards set forth in such cases as *Turner* and *Barnes*.

The due process clause only requires that a state prove the essential elements of the crime charged. *Mullaney v. Wilbur*, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975). If the presumption concerns a fact ancillary to the crime, such as an affirmative defense, there is no constitutional reason to demand that the logic giving rise to the presumption meet a certain due process or burden-of-proof standard. The Supreme Court underscored this point in *Patterson v. New York*, 432 U.S. 197, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977). The Court emphasized that the earlier holding of *Mullaney v. Wilbur*, *supra*, still stood:

> *Mullaney* surely held that a State must prove every ingredient of an offense beyond a reasonable doubt, and that it may not shift the burden of proof to the defendant by presuming that ingredient upon proof of the other elements of the offense. This is true even though the State's practice, as in Maine, had been traditionally to the contrary. Such shifting of the burden of persuasion with respect to a fact which the State deems so important that it must be either proved or presumed is impermissible under the Due Process Clause.

Patterson v. New York, 432 U.S. at 215, 97 S.Ct. at 2330. In *Patterson*, however, the Court upheld a New York law designating insanity as an affirmative defense. The Court reasoned that sanity was not an essential ingredient of murder; a person could intentionally kill another person, "an act which it is not disputed the State may constitutionally criminalize and punish", without being completely sane. *Id.* at 209, 97 S.Ct. at 2326. Nor had the New York legislature deemed sanity so important to make it an ingredient that must be proven by the government. Instead, once the fundamental ingredients of the crime exist, the legislature may choose "to recognize a factor [*i.e.*, insanity] that mitigates the degree of criminality or punishment" and place the burden of raising and proving this mitigating factor upon the defendant. *Id.* Thus, the government's burden of proof and any presumptions that may affect that burden are only constitutionally relevant if they relate to an indispensable "ingredient" of the crime or an ancillary ingredient that the legislature has directed the government to prove.

Patterson holds that sanity is not an essential, constitutional ingredient of the crime of murder. Nor has the Massachusetts legislature deemed sanity sufficiently important to statutorily designate it as an element of murder to be proven by the government beyond a reasonable doubt.[6] In fact, the Massa-

[6]The requirement that the government prove sanity beyond a reasonable doubt is a judicial doctrine. *See e.g., Commonwealth v. Johnson*, 188 Mass. 382, 74 N.E. 939 (1905). This standard must be considered in context with another long-established judicial doctrine, the "presumption of sanity". Even if one finds that the presumption reduces the government's burden of proof on the issue of sanity to something less than "beyond a reasonable doubt", the burden of proof is strictly a judicially created standard in Massachusetts.

This is not a case where the legislature has balanced competing concerns and designated sanity as an element (or ingredient) of the crime, only to have a state court dilute that standard by creating an evidentiary presumption. *Patterson* primarily was concerned with allowing the legislative branch

chusetts Supreme Judicial Court, in an opinion foreshadowing the reasoning of *Patterson*, held that sanity is not an element of the Massachusetts crime of murder. *Commonwealth v. Kostka, supra*, at 455. The Massachusetts court stated: "We do not believe that a defendant's mental disease or defect . . . bears any 'necessary relationship to the existence or nonexistence of the required mental elements of the crime [charged].' *Mullaney* v. *Wilbur*, 421 U.S. 684, 706, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975) (Rehnquist, J., concurring)." *Id.* at 455 n.15. Because neither the federal constitution nor Massachusetts law make sanity an ingredient of the crime of murder, the burden of proof on the issue of sanity and the effect that the Massachusetts "presumption of sanity" has on that burden do not raise constitutional questions. We must agree with the conclusion of the Massachusetts Supreme Judicial Court:

> If sanity were an "element" of the crime charged, then recent Supreme Court cases on the use of presumptions and inferences to establish an element of the offense would be apposite to our inquiry. Because sanity is not an element of the crime charged, we do not think that cases like *Barnes v. United States*, 412 U.S. 837, 93 S.Ct. 2357, 37 L.Ed.2d 380 (1973); *Turner v. United States*, 396 U.S. 398, 90 S.Ct. 642, 24 L.Ed.2d 610 (1970); and *Leary v. United States*, 395 U.S. 6, 89 S.Ct. 1532, 23 L.Ed.2d 57 (1969), which concerned the use of statutory

sufficient leeway to define mitigating factors that affect criminality. 432 U.S. at 210, 97 S.Ct. 2319. That decision does not authorize judicial modification of a legislature's evidentiary standard. Once the legislature designates a fact to be proven "beyond a reasonable doubt" by the government, an expectation is created and the fact must be proven in accord with the legislative standard and due process. 432 U.S. at 215, 97 S.Ct. 2319. When the legislature is silent, however, traditional judicial evidentiary standards are controlling.

and common law inferences to establish an element of the crime charged, set forth the appropriate test.

Id. at 455-56. *See also Commonwealth v. Walker, supra* at 700.

THE PRISONER DOCK

Petitioner claims that his confinement to the prisoner dock unconstitutionally eroded his presumption of innocence in the eyes of the jury. Confinement in the prisoner dock is analogized to the wearing of prison garb during trial, a practice held unconstitutional in *Estelle* v. *Williams*, 425 U.S. 501, 96 S.Ct. 1691, 48 L.Ed.2d 126, *reh. den.*, 426 U.S. 954, 96 S.Ct. 3182, 49 L.Ed.2d 1194 (1976). Petitioner argues that confinement in the prisoner dock served as a "constant reminder of the accused's condition . . . [that] may affect a juror's judgment . . . [and] is so likely to be a continuing influence throughout the trial that . . . an unacceptable risk is presented of impermissible factors coming into play." *Id.* at 504-05, 96 S.Ct. at 1693.

The practice of isolating the accused in a four foot high box very well may affect a juror's objectivity. Confinement in a prisoner dock focuses attention on the accused and may create the impression that he is somehow different or dangerous. By treating the accused in this distinctive manner, a juror may be influenced throughout the trial. The impression created may well erode the presumption of innocence that every person is to enjoy. Of course, "[t]he actual impact of a particular practice on the judgment of jurors cannot always be fully determined. But this Court has left no doubt that the probability of deleterious effects on fundamental rights calls for close judicial scrutiny." *Id.* at 504, 96 S.Ct. at 1693.

We see no state policy sufficiently compelling or essential to justify risking a dilution in the accused's presumption of innocence.

The Massachusetts courts and the federal district court found that this traditional practice of prisoner dock confinement served such state purposes as: identification of the accused person to the jury; minimizing the danger of harm to the public, court, and jury; and encouraging maintenance of courtroom order.

From the record in this case, we cannot determine whether the practice of the prisoner dock realistically promoted the interests of safety or courtroom order. In any event, the use of a dock is hardly the most advanced or least restrictive means of insuring courtroom order and protection. This is not a case where the prisoner exhibited any dangerous and disruptive propensities at trial. *See Illinois v. Allen*, 397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970). Further, argument that the dock helped identify the accused is hardly persuasive. Prison clothing served identification purposes in *Estelle v. Williams, supra*; yet, the Supreme Court found this to provide no justification for the practice. The defendant can be easily identified without using the dock. Thus, even if the state's purposes are rational on an abstract level, the use of a prisoner dock may not further those interests significantly.

We must agree with District Judge Caffrey in terming the prisoner's dock "an anachronism in a modern criminal trial which could have been abandoned years ago". *Walker v. Butterworth*, 457 F.Supp. 1233 at 1239 (D.Mass.1978). The right to a fair trial is simply too delicate and valuable a right to be impeded by an anachronistic practice. Because confinement in the prisoner dock is unnecessary to accomplish any important state interest and may well dilute the presumption of innocence, the Massachusetts prisoner dock must be considered, as a general matter, to be an unconstitutional practice.

The record is unclear as to whether this unconstitutional practice constituted harmful error in this case. Determining harmless error in such a case is always difficult because "[t]he actual impact of a particular practice on the judgment of jurors cannot always be fully determined." *Estelle* v. *Williams*, 425 U.S. at 504, 96 S.Ct. at 1693. It is true that the record reveals no evidence of prejudicial references to the defendant's confinement; yet, this is no guarantee that the jurors failed to be influenced by the prisoner dock. In such a situation, the objective record may often prove unenlightening, but a court should be ready to vindicate constitutional rights whenever an "unacceptable risk" is presented. *Id.* at 505, 96 S.Ct. 1691. Because we find other grounds upon which to grant this petition, however, we need not decide, from the rather bare record before us, whether the use of the prisoner dock produced a likelihood of harmful error in this case.[7]

Personal Exercise of Peremptory Challenges

The trial judge, in keeping with traditional Massachusetts practice in a murder case, required Walker to personally exercise his peremptory challenges. Walker was allowed to consult with his attorney about each prospective juror but he was required, in the presence of each individual juror, to announce his decision personally. After the prosecutor emphasized petitioner's ability to make such peremptory challenges personally, the trial judge's charge did inform the jury that such personal challenges were required.

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[7] Judge Bownes would find reversible constitutional error in the use of the prisoner dock. Judge Coffin shares the writer's concerns about the serious constitutional questions raised by the use of the prisoner dock in this case but would reserve decision on the issue until such time as it is necessary for the disposition of an appeal. Accordingly, Judge Coffin does not join in the portion of the opinion dealing with the prisoner's dock.

Both the Massachusetts Supreme Judicial Court and the federal district court criticized the prosecutor's conduct as ill advised but rejected petitioner's contention that the required personal exercise of his challenges violated his privilege against self-incrimination.

These courts reasoned that the petitioner's peremptory challenges may have been probative as to his competency at the time of trial; but this forced communication was found to have little if any relation to the central issue of petitioner's sanity at the time of the offense.[8] The federal district court also analogized petitioner's conduct to physical actions which possessed no testimonial or communicative content.

We cannot accept this reasoning. In a case where sanity is the sole issue, the court's requirement that the petitioner personally exercise his peremptory challenges and the prosecution's subsequent emphasis on the conscious and knowing exercise of those challenges combined to violate petitioner's constitutional privilege against self-incrimination.

There is no dispute that Walker was required, against his will and over his attorney's objection, to announce his objection or contentment as to each individual juror in front of that juror. Of course, the fact that the accused is forced to utter words does not, in itself, constitute self-incrimination. Recordings of an accused's voice are permissible if they are "used solely to measure the physical properties of the witnesses' voices, not for the testimonial or communicative content of what was to be said". *United States* v. *Dionisio*, 410 U.S. 1, 7, 93 S.Ct.

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[8] As both courts noted, the Massachusetts Supreme Judicial Court had used similar reasoning in rejecting a nearly identical self-incrimination claim at a much earlier date. *Commonwealth* v. *Millen*, 289 Mass. 441, 194 N.E. 463 *cert. denied*, 295 U.S. 765, 55 S.Ct. 924, 79 L.Ed. 1706 (1935). The *Millen* case was decided long before *Malloy* v. *Hogan*, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964) applied fifth amendment principles to the states. Thus, *Millen* should carry little, if any, precedential weight in a claim based upon the federal constitution.

764, 768, 35 L.Ed.2d 67 (1973). Likewise, requiring the uttering of words in a lineup, for purposes of identification rather than as a way of eliciting testimony, does not violate the privilege against self-incrimination. *United States* v. *Wade*, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967). Nor has the fifth amendment ever prohibited the government from requiring the accused to supply some form of incriminating evidence. In *Schmerber v. California*, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966), the Supreme Court allowed the government to introduce an incriminating blood sample involuntarily taken from the defendant. The Supreme Court noted that a distinction had emerged in the law of self-incrimination: "the privilege is a bar against compelling 'communications' or 'testimony,' but that compulsion which makes a suspect or accused the source of 'real or physical evidence' does not violate it." *Id.* at 764, 86 S.Ct. at 1832.

The critical question, for the purposes of the self-incrimination clause, is whether the forced utterances had communicative content. One can safely start with the premise that Walker's statements of objection or satisfaction were not typical testimony in the sense of narrating an occurrence or confessing guilt. The concept of verbal communication, however, is not limited to narration or direct confessions of guilt. Rather, verbal communication is the use of words to impart or transmit information. Walker's comments constitute such verbal communication.

Walker obviously was communicating his satisfaction with the individual jurors. More importantly, these forced words revealed Walker's mental process of evaluating each juror. In exercising these challenges, Walker was transmitting, against his will, an important message to the jury. Roughly translated, this message would read: "the accused can rationally and sanely communicate with his lawyer and make important

trial decisions."[9] Each juror was not measuring Walker's words for their "physical properties", *United States v. Dionisio*, *supra*, and the words were not being used for their identifying characteristics, *United States v. Wade*, *supra*. Taken in isolation, the words "I am content with this juror" mean little. But, in the context of an insanity defense, the words necessarily take on an additional meaning and relate important and incriminating information. The content of the words and the mental processes that they necessarily embodied and revealed, conveyed an inescapable message to the jury. The message conveyed was directly relevant to the sole issue at trial and can be fairly defined as communication for the purposes of the privilege against self-incrimination.

Any doubts as to the communicative or testimonial nature of the peremptory challenges were resolved by the prosecutor's closing argument. The prosecutor had no doubt about the important statement that Walker's words conveyed. In highlighting the accused's personal exercise of the peremptory challenges, the prosecutor explicitly repeated the words spoken by Walker and attempted to utilize them as testimonial evidence bearing upon Walker's sanity.[10] Requiring Walker to speak

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[9] Of course, this transmitted message might be completely erroneous. Forcing one to exercise his peremptory challenges personally may well produce a dangerously incorrect impression of sanity precisely because the person is not communicating with entire independence and under his own free will. The likelihood that the message transmitted may be erroneous argues for applying the protections of the fifth amendment. Prohibiting the inherent unreliability of forced communication is an important policy reflected in the privilege against self-incrimination. *See Murphy v. Waterfront Comm'n*, 378 U.S. 52, 55, 84 S.Ct. 1594, 1597, 12 L.Ed.2d 678 (1964) (the privilege reflects "our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes 'a shelter to the guilty,' is often 'a protection to the innocent.'").

[10] In this case we are concerned with how the prosecutor's argument reinforced and aggravated the court's infringement upon the accused's privilege against self-incrimination. We do not find *Donnelly v. DeChristoforo*, 416

and seizing upon his words as constituting evidence against him, threatened the central values of the privilege against self-incrimination:

> [T]he constitutional foundation underlying the privilege is the respect a government — state or federal — must accord to the dignity and integrity of its citizens. To maintain a "fair state-individual balance," to require the government "to shoulder the entire load," 8 Wigmore, Evidence 317 (McNaughton rev. 1961), to respect the inviolability of the human personality, our accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth. *Chambers v. Florida*, 309 U.S. 227, 235-238, 60 S.Ct. 472, 476-477, 84 L.Ed. 716 (1940). In sum, the privilege is fulfilled only when the person is guaranteed the right "to remain silent unless he chooses to speak in the unfettered exercise of his own will." *Malloy v. Hogan*, 378 U.S. 1, 8, 84 S.Ct. 1489, 1493, 12 L.Ed.2d 653 (1964).

Miranda v. Arizona, 384 U.S. 436, 460, 86 S.Ct. 1602, 1620, 16 L.Ed.2d 694 (1966).

Forcing one to exercise his peremptory challenges personally is hardly comparable to the practices of the Star Chamber. In the context of an insanity defense, however, the uttering of

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U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974) directly relevant. *Donnelly* concerns the degree of prosecutorial misconduct necessary to constitute a violation of general due process protections. Because we find that a specific constitutional guarantee was implicated in this case, the standard set forth in *Donnelly* is not applicable.

peremptory challenges reveals damaging inferences. In capitalizing upon Walker's utterances, the prosecutor was not producing evidence by his own independent labors but relying upon the simple expedient of compelling testimony from the accused. Walker simply was not provided the right "to remain silent unless he chooses to speak in the unfettered exercise of his own will." *Malloy v. Hogan*, 378 U.S. 1, 8, 84 S.Ct. 1489, 1493, 12 L.Ed.2d 653 (1964).

The present case is a far cry from cases holding that no fifth amendment violation exists when a court orders psychiatric examination of defendants pleading insanity. The legal arguments and theoretical justifications that support compelled psychiatric examination are completely inapplicable to this case. In a psychiatric examination, a neutral expert analyzes the defendant's statements, dreams and actions; the psychiatrist then correlates this information to medical postulates and issues a report. Although such an examination often requires compelled communication from the defendant, the courts find the resulting psychiatric analysis sufficiently neutral and buffered by expertise to equate it with the medical examination of physical characteristics upheld in *Schmerber*, *supra*. *See, e.g., United States v. Baird*, 414 F.2d 700 (2d Cir. 1969). These courts recognize that expert examination of the defendant who pleads insanity is one of the few methods of obtaining scientific, reliable evidence on the issue. *See, e.g., United States v. Bohle*, 445 F.2d 54, 66 (7th Cir. 1971); *United States v. Handy*, 454 F.2d 885 (5th Cir. 1971). Even though compelled communication is involved, the psychiatric examinations are constitutionally permissible because the "great importance of expert testimony on the issue of insanity" outweighs "the minimal risk to the Fifth Amendment privilege." *United States v. Bohle*, 445 F.2d at 66.

Compared to the rationale supporting compelled psychiatric examinations, this case presents almost the reverse situation.

The prosecutor decided not to introduce any expert testimony but instead relied, in part, on the defendant's personal exercise of peremptory challenges. The forced statements in this case went directly to the jury; the lack of any expert evaluation or guidance made these statements extremely unreliable and prejudicial. Indeed, because these comments were compelled, they are not evidence of any rational decisional process; yet, to each juror the appearance of the defendant uttering these words and apparently making important trial decisions was both damaging and misleading. The prosecutor's comments exacerbated the situation. This series of events threatened one of the key purposes behind the self-incrimination clause: protection against forced, unreliable evidence. *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 55, 84 S.Ct. 1594, 12 L.Ed.2d 678 (1964).

This is not a situation where there is an important interest to be served by permitting reliable and expert evidence. In fact, no rational purpose supports the archaic practice of compelling a defendant to personally exercise peremptory challenges.[11] When the prosecution spurns expert testimony and relies upon compelled statements which transmit an extremely unreliable message, there is a substantial risk to the fifth amendment privilege. In light of this risk and the lack of any countervailing purpose, the constitutional balance is struck differently than in such cases as *Bohle*, *supra*. When sanity is an issue, the practice of requiring and allowing comment on the personal exercise of peremptory challenges unconstitutionally infringes the accused's privilege against self-incrimination.

This constitutional violation cannot be overlooked by asserting that Walker's utterances were only probative of his compe-

[11] Unlike a guilty plea, where personal communication is helpful to show full comprehension and voluntariness, the exercising of peremptory challenges does not necessitate complete comprehension by the accused or his personal participation.

tency at the time of trial. Almost inevitably, evidence of defendant's current mental abilities carried inferential weight as to his past mental condition. The actual impact of the defendant's utterances on the jury cannot be measured. The prosecutor certainly recognized that demonstrating sanity at the time of trial might well persuade the jury of the accused's sanity at the time of the crime.

The personal exercise of the peremptory challenges communicated damaging information to the jury. Even so, the Commonwealth argues, the accused's expressions or actions in the courtroom could have communicated the same information. Maybe so, but this argument misses the point. Unlike expressions or actions, the challenges were compelled. The defendant could not control the words or conceal the thought process that they revealed. This compulsion, for the purpose of the privilege against self-incrimination, makes all the difference.

We must conclude that the compelled utterances conveyed important and relevant information to the jury. The prosecutor insured that the utterances conveyed the message of the accused's sanity; the sanity of the accused was the sole issue at trial. In the context of this case, such a combination of occurrences violated Walker's privilege against self-incrimination and denied him a fair trial. The trial judge's well intentioned, but highly generalized, charge could not adequately remedy the constitutional violation.

Recognizing that the privilege against self-incrimination is an essential mainstay of our adversary system and a hallmark of our society, we reverse.

The writ of habeas corpus shall issue unless the Commonwealth makes arrangements for a new trial within ninety days.